THE

ELEMENTS OF ROMAN LAW

BY GAIUS.

London

HENRY FROWDE

OXFORD UNIVERSITY PRESS WAREHOUSE

7 PATERNOSTER ROW

GAII

INSTITUTIONUM IURIS CIVILIS COMMENTARII QUATUOR

OR

ELEMENTS OF ROMAN LAW BY GAIUS

WITH A TRANSLATION AND COMMENTARY

BY

EDWARD POSTE, M.A.
BARRISTER AT LAW
AND FELLOW OF ORIEL COLLEGE, OXFORD

SECOND EDITION, REVISED AND ENLARGED.

Oxford
AT THE CLARENDON PRESS
M.DCCC.LXXV

PREFACE TO SECOND EDITION.

In the year 1816, Niebuhr noticed in the library of the Cathedral Chapter at Verona a manuscript in which certain compositions of Saint Jerome had been written over some prior writings, which in certain places had themselves been superposed on some still earlier inscription. On communication with Von Savigny, Niebuhr came to the conclusion that the lowest or earliest inscription was an elementary treatise on Roman Law by Gaius, a treatise hitherto only known, or principally known, to Roman lawyers by a barbarous epitome of its contents inserted in the code of Alaric 2, king of the Visigoths. The palimpsest or rewritten manuscript originally contained 129 folios, three of which are now lost. One folio belonging to the Fourth Book (§ 136–§ 144) having been detached by some accident from its fellows, had been published by Maffei in his Historia Teologica, A.D. 1740, and republished by Haubold in the very year in which Niebuhr discovered the rest of the codex.

Each page of the MS. generally contains twenty-four lines, each line thirty-nine letters; but sometimes as many as forty-five. On sixty pages, or about a fourth of the whole, the codex is doubly palimpsest, i. e. there are three inscriptions on the parchment. About a tenth of the whole is lost or completely illegible, but part of this may be restored from Justinian's Institutes, or from other sources; accordingly, of the whole Institutions about one thirteenth is wanting, one half of which belongs to the Fourth Book.

From the style of the handwriting the MS. is judged to be older than Justinian or the sixth century after Christ; but probably did not precede that monarch by a long interval. The word Dimissum, often used in the code of Alaric 2, in the unclassical sense of lega-

tum, occurs in 2 § 195, and looks like an annotation transferred by a transcriber from the margin to the text. As this use of the word is very barbarous and comparatively recent, Huschke is inclined to believe that the century preceding Justinian is the earliest date that can be assigned to the MS.

In a year after Niebuhr's discovery the whole text of Gaius had been copied out by Goeschen and Hollweg, who had been sent to Verona for that purpose by the Prussian Royal Academy of Sciences, and in 1820 the first edition was published. Since that time the text has been gradually purified by the labours—the wonderful learning, ingenuity, and patience—of many distinguished German jurists and scholars.

Little is known about Gaius, not even his family name (cognomen), or gentile name (nomen), for Gaius is merely an individual name (praenomen). The word 'Gaius' is a trisyllable in the classical period, for instance, in the versification of Catullus, Martial, and Statius; but at a later period, e. g. in the versification of Ausonius, it is contracted into a dissyllable.

Respecting his date, we know that he flourished under the emperors Hadrian (A.D. 117–138), Antoninus Pius (A.D. 138–161), Marcus Aurelius Antoninus (A.D. 161–180), and Commodus (A.D. 180–192). Gaius himself mentions that he was a contemporary of Hadrian, Dig. 34, 5, 7, pr. He apparently wrote the First Book of his institutions under Antoninus Pius, whom he mentions, § 53, § 74, § 102, without the epithet Divus (of divine or venerable memory), a term only applied to emperors after their decease, but in the Second Book, § 195, with this epithet. The Antoninus mentioned, § 126, is either Pius or Marcus Aurelius Philosophus. Respecting the rules of Cretio, 2 § 177, Gaius appears not to be cognizant of a constitution of Marcus Aurelius mentioned by Ulpian, 22, 34. That he survived to the time of Commodus appears from his having written a treatise on the Sc. Orphitianum, an enactment passed under that emperor.

As the opinions of Gaius are not quoted by the subsequent jurists whose fragments are preserved in the Digest, it has been inferred that Gaius was a public teacher of jurisprudence (jus publice docens), who never in his lifetime obtained the highest distinction of the legal profession, the title of juris auctor (jus publice respondens). Valentinian, however, after his death raised Gaius to the position of juris auctor, that is, gave to his writings

pre-eminent auctoritas, or exclusive legislative authority, equal to that of four other jurists, Papinian, Ulpian, Paulus, and Modestinus.

Besides his Institutions, Gaius was the author of many other treatises, of which fragments are preserved in the Digest, and some of which are alluded to by Gaius in the Institutions. For instance, he wrote a treatise on Edictum Urbicum, 1 § 188, which, as opposed to Edictum Provinciale, probably embraced the edicts of the Praetor urbanus, the Praetor peregrinus, and the Aedilis curulis; a commentary on the Twelve Tables, another on the lex Papia Poppaea, another on the works of Quintus Mucius, besides a treatise on Res quotidianae, and the above-named treatise on Sc. Orphitianum and another on Sc. Tertullianum.

The name of the recently discovered work does not appear in the MS.; but from the proem to Justinian's Institutes appears to have been INSTITUTIONES, or to distinguish it from the systems of Rhetoric which also bore this name, INSTITUTIONES IURIS CIVILIS. From the way in which it is mentioned by Justinian, we may infer that for 350 years the *élite* of the youth of Rome were initiated in the mysteries of jurisprudence by the manual of Gaius, much as English law students have for many years commenced their labours under the auspices of Blackstone. It is probably in allusion to the familiarity of the Roman youth with the writings of Gaius that Justinian repeatedly calls him (e.g. Inst. proem, 6; Inst. 4, 18, 5; and in the Constitution prefixed to the Digest, and addressed ad Antecessores, § 1), 'our friend Gaius' (Gaius noster). The shortness of the time that sufficed Tribonian and his colleagues for the composition of Justinian's Institutes (apparently a few months towards the close of the three years devoted to the compilation of the Digest, Inst. proem) is less surprising when we see how closely Tribonian has followed the arrangement of Gaius, and how largely, when no change of legislation prohibited, he has appropriated his very words.

Certain internal evidences, as already noticed, fix the date at which portions of the Institutions were composed. The emperor Hadrian is spoken of as Departed or Deceased (Divus) except in 1 § 47 and 2 § 57. Antoninus Pius is sometimes (1 § 53, 1 § 102) named without this epithet, but in 2 § 195 has the style of Divus. Marcus Aurelius was probably named, 2 § 126, and the Institutions were probably published before his death, for 2 § 177, as above mentioned, contains no notice of a constitution of his, recorded by

Ulpian, that bears on the matter in question. Paragraphs 3 § 24, § 25 would hardly have been penned after the Sc. Orphitianum, A.D. 178, or the Sc. Tertullianum, A.D. 158.

An apograph or facsimile edition of the Veronese MS. has been published in the last year by Studemund, and we may hope that the learned editor will shortly publish a version of the text containing the emendations suggested by the apograph. In the meantime I have reprinted the very judicious edition of Gaius given by Gneist in his Syntagma Iuris Romani, with, however, a few variations, which are indicated in an Appendix.

In the text of Gaius, the words or portions of words which are purely conjectural are denoted by italics. The orthography of the Veronese MS. is extremely inconstant. Some of these inconstancies it will be seen are retained: e. g. the spelling oscillates between the forms praegnas and praegnans, nanctus and nactus, erciscere and herciscere, prendere and prehendere, diminuere and deminuere, parentum and parentium, vulgo and volgo, apud and aput, sed and set, proxumus and proximus, affectus and adfectus, inponere and imponere, &c. Some irregularities likely to embarrass the reader, e.g. the substitution of v for b in debitor and probare, the substitution of b for v in servus and vitium, have been tacitly corrected. The numeration of the paragraphs was introduced by Goeschen in his first edition of Gaius, and for convenience of reference has been retained by all subsequent editors. The rubrics or titles marking the larger divisions of the subject, with the exception of a few at the beginning, are not found in the Veronese MS. Those that are found are not very apposite, and are supposed not to be the work of Gaius, but of a transcriber. To distinguish them from the others they are accompanied with a translation. The remainder are partly taken from the corresponding sections of Justinian's Institutes, partly invented or adopted from other editors.

An elementary treatise can scarcely make any profession of originality. I have availed myself of lights wherever I could obtain them. And, not to crowd the following pages with references to the writers to whom I am indebted, I must here once for all acknowledge my obligation, not to mention many authors from whom I have borrowed isolated views or quotations, to Austin, to Ortolan, to Puchta, to Ihering, to Bethmann-Hollweg, and above all to Vangerow and Von Savigny.

For the sake of students who have used the first edition it may

be observed that the principal changes of opinion in this edition relate to the nature of Exceptions and Interdicts.

The principal additions to the commentary relate to the following subjects:

Disposition and the incidents of Ignorance and Compulsion, p. 9:
Coemptio, p. 96:
In integrum restitutio, p. 151:
Juristic persons, p. 153:
Servitudes, pp. 165, 179, 487:
Testamentifactio and Capacitas, p. 222:
Ereptio for indignitas, p. 225:
Postumi sui, classification of, p. 235:
Juxta-tabular and Contra-tabular possession, pp. 229, 238:
Tempus utile, p. 255:
Institution of another person's slave as successor, meaning of, p. 262:
Lex Falcidia, operation of, p. 293:
Mora, p. 302:
Municipalities, Origo, Domicilium, Forum, Lex, Comity of nations, pp. 335, 541:
Insolvency, p. 351:
Intercessio, Correality, Solidarity, Delegatio, Interventio, pp. 395, 670:
Litis contestatio, p. 445:
Damages, measure of, p. 469:
Prescription, Nativity of right of action, p. 580:
Simulative dispositions, p. 666.

The translation has been modified (I trust, with advantage, notwithstanding the novelty of certain expressions) in various places, particularly in passages relating to Praetorian succession (Bonorum possessio) and to Exceptio.

As substantive institutions, subject to peculiar incidents and governed by peculiar rules, Bonorum possessio contra tabulas and Bonorum possessio secundum (or, juxta) tabulas require to be denoted by distinctive names, or at least by circumlocutions wherein their distinctive feature appears as a differentia: accordingly they have been respectively rendered by the terms Contra-tabular possession and Juxta-tabular possession.

Exceptio in the first edition was regarded as a defence appealing to Equity or jus praetorium, as opposed to a defence appealing to

Law or jus civile or jus strictum. In the present edition it is regarded, in accordance with the exposition of Savigny, as a defence alleging a collision between the right of the plaintiff and a counter right of the defendant, as opposed to a defence denying the right of the plaintiff: and, wherever significant expressions have been attempted, the translation has been correspondingly modified.

Legis actio, the technical name of the primitive mode of procedure, as presenting a contrast both to an earlier system of violent self-redress and to a later system (marked by diminished jealousy of the magistrate) of magisterial interposition and magisterial discretion, has been invariably rendered by the term Statute-process.

CHRONOLOGICAL TABLE.

B.C.	
753.	Foundation of Rome.
578—535.	Servius Tullius. Division into thirty Tribes. Institution of Comitia Tributa, Census, Comitia Centuriata.
494.	First secession of the Plebs. Appointment of Tribunes of the Plebs.
451.	Laws of the Ten Tables promulgated.
450—449.	Two additional Tables of Laws. The Patricians incorporated in the Local Tribes. Lex Valeria Horatia gives legislative power to Comitia Tributa.
366	First appointment of a Praetor.
339.	Q. Publilius Philo, Dictator, abolishes the veto of the Comitia Centuriata on the legislative measures of the Comitia Tributa.
326	Partial abolition of Nexum.
312.	Cnaeus Flavius publishes a calendar of Dies Fasti and Nefasti.
287.	Last secession of the Plebs. Q. Hortensius, Dictator, abolishes the veto of the Senate on the legislative measures of the Comitia Tributa.
269.	First issue of silver coins at Rome.
264.	First gladiatorial exhibition at Rome.
244.	Lex Silia about this time.

B.C.	
234.	Lex Calpurnia about this time.
204.	Lex Cincia.
170.	Lex Aebutia.
122.	C. Gracchus gives judicial functions to the Equites.
90.	Lex Julia confers the franchise on all the Latins.
89.	The franchise granted to all the confederate towns of Italy, and the Latin franchise to the Transpadani.
27.	Octavianus receives the titles of Augustus and Imperator.
A.D.	
4.	Lex Aelia Sentia.
9.	Lex Papia Poppaea.
19.	Lex Junia Norbana.
62.	Sc. Trebellianum.
69—79.	Vespasian.
98—117.	Trajan.
117—138.	Hadrian.
131.	Edictum Perpetuum promulgated.
138—161.	Antoninus Pius.
161—180.	Marcus Aurelius Antoninus Philosophus.
180—192.	Commodus.
294.	Judicia Ordinaria abolished by Diocletian.
527—565.	Justinian.

CONTENTS.

BOOK I.

STATUS OR UNEQUAL RIGHTS [DE PERSONIS].

BOOK II.

EQUAL RIGHTS [DE REBUS].

BOOK III.

BOOK IV.

PROCEDURE [DE ACTIONIBUS].

EXPLANATION OF ABBREVIATIONS.

Inst. Institutes of Justinian.

Dig. or D. Digest or Pandects of Justinian.

Cod. or C. Codex of Justinian.

The meaning of the numbers that follow these abbreviations will be obvious to any one who opens a volume of the Corpus Juris.

Pr. stands for principio, meaning, in the first paragraph of a title of the Institutes, or of a fragment of a title of the Digest.

The Commentaries of Gaius are referred to by numbers indicating the book and the paragraph: e.g. 2 § 5, indicates the 5th paragraph of Book 2.

When Ulpian or Paulus is quoted, the works referred to are the Regulae of Ulpian and the Sententiae Receptae of Paulus.

ERRATA.

Page 22, last line, *for* premisses *read* premiss.

„ 30, line 2, *for* exception *read* exceptio.

„ 53, l. 27, *for* (decuriae Senatores) *read* (decuriae) Senatores.

„ 65, l. 16, *for* judicium *read* judicum.

„ 79, § 80, l. 18, *for* Romano *read* Romana.

„ 294 (5), l. 3, *for* on him and on the heres *read* on him or on the heres.

ELEMENTS OF ROMAN LAW.

BOOK I.

DE PERSONIS.

THE following treatise is a portion of a particular jurisprudence; it is an exposition of the Civil Law of Rome, that is to say, of her Private law (jus privatum) as opposed to her Public law (jus publicum) in both acceptations, in other words, as opposed both to her Criminal law and to her Constitutional law.

A scientific jurisprudence and a well-arranged code would imitate the method of the natural sciences in proceeding from the universal to the particular, from the general to the special: that is, before expounding the special branches of law, would enunciate the ideas and principles common to all the branches. The advantage gained by this arrangement would be simplification and the avoidance of repetition. Thus Biology expounds the general doctrines of anatomy and physiology before it treats in detail of the separate classes of vegetables or animals; and the best German jurists follow a similar method in their Pandects or systematic expositions of Roman law. Gaius, however, in his Institutions, thinking, perhaps, that the concrete should be presented to beginners before the abstract, omits the general or transcendental basis of jurisprudence and plunges at once into the special divisions of the code. A commentator on Gaius, accordingly, must reduce the generalizing portions to the most necessary dimensions, and confine himself

to unfolding the import of some of the pivot terms and most pervading conceptions; and we shall find most of the definitions we require already elaborated for us in the writings of Austin, to whose valuable but unfortunately unfinished Lectures on Jurisprudence I am indebted for many of the definitions and divisions that will be employed in this introduction.

A few definitions will suffice. The words which denote the instruments and materials of legislation and the subject-matter of jurisprudence are Law, Sanction, Title, Right, Obligation. The definitions of these five terms may, indeed, be regarded as a single definition, for the things denoted by these five words are merely the same thing looked at from different sides: at least they are correlative ideas, indissolubly connected parts of the same indivisible whole. The definitions of these terms which we proceed to give are their definitions, it is to be observed, as used in jurisprudence, that is, in the exposition not of natural or moral laws but of positive or political laws, and are accordingly unconnected with the hypotheses of any particular school of Ethical speculation.

A Law is a command; that is to say, it is the signification by a lawgiver to a person obnoxious to evil of the lawgiver's wish that such person should do or forbear to do some act, with the intimation of an evil that will be inflicted in case the wish be disregarded.

Points to be noted here are the author and the subject of law. Every law is set by a sovereign person or a sovereign body of persons to a member or members of the independent political society wherein that person or body is sovereign or supreme: it is set by a monarch or sovereign number to a person or persons in a state of subjection to its author. A Sovereign is a determinate human superior, who receives habitual obedience or submission from the bulk of a given society, and is not in the habit of yielding obedience to a like superior.

A Sanction is the evil annexed to the command of the lawgiver.

Obligation or duty is the burden imposed by the command of the lawgiver on a person obnoxious to the evil annexed to the command.

Right is the capacity of exacting by the power of the sovereign certain acts or forbearances; or, it is the capacity of the person benefited by a doing or forbearance commanded by the lawgiver to enforce that performance or forbearance from the person to

whom it is onerous, that is, to whom it is commanded, by an appeal to the sovereign power to whom such person is subject.

Dealing at present with the Civil code, we shall confine ourselves, in treating of Rights, to rights of subject against subject, that is, to rights which imply a common superior. Whether a sovereign can have rights against his own subject, whether, that is, the conception of rights permits the same person to be party and sovereign, is a question that may be left to the theory of the Political code. The question whether a sovereign, in his civil courts of judicature, shall accord rights to a foreign potentate, that is, to one who owes him no allegiance, may be left to the theory of the salutary but sanctionless code called the Comity of nations.

Title is the fact, event, or circumstance defining or designating the person on whom the lawgiver confers a right or on whom he imposes an obligation. The word Title is employed in a limited application by English lawyers, to denote the mode of acquiring a Real right; but we use it without any limitation to any branch of law, to denote universally the fact originating any right, real or personal, and not only to denote the fact originating any right, but also the fact originating any obligation, civil or criminal; nay, further, not only to denote the mode in which any right, or obligation is originated, or begins, but also to denote the mode in which any right or obligation is terminated or comes to an end. To use the nomenclature of Bentham, a Title is a fact Collocative[1] of Rights and Obligations. The generic term Collocative splits into Investitive and Divestitive. Title, then, is a fact Investitive or Divestitive of Rights and Obligations. Investitive again splits into Collative and Impositive, and Divestitive into Privative and Exonerative. Title, then, definitively, is any fact Collative or Privative of a Right and Impositive or Exonerative of an Obligation.

Every Right implies a Law by which it is created, a Title to which it is annexed, a Sovereign by whom it is enforced, a Sanction by means of which it is enforced, a person in whom it resides, and a person on whom a correlative obligation is incumbent. The same, mutatis mutandis, may be said of every relative Obligation. We say of every relative obligation, for not all obligations are relative. Obligations are either relative or absolute; relative are those which imply a private person invested with a corresponding right, absolute

[1] As the term Disposition is presently used in a narrower sense, the term Collocative has been substituted for Bentham's term Dispositive.

those which do not involve a private person invested with a correlative right. For instance, the duties violated by smuggling, by polygamy, by breach of prison, by cruelty to brute animals, are not obligations to a private person but to the Sovereign, and the rights of the Sovereign, if he has any, have no limits but the limits of his might, and bear no resemblance to the rights contemplated by the Civil code, which are acts or forbearances, enforcible by appeal to a common human superior; for the Sovereign, ex vi termini, has no human superior. All rights, then, imply correlative obligations, but not all obligations imply correlative rights.

Every legislation or system of laws is composed of a vast number of particular laws, having the same or analogous features, just as every tissue is composed of an infinity of threads, and every vegetable or animal organism of an infinity of cells: and having before our eyes the cardinal points of any individual law, by considering the division or differentiation of these cardinal points we may anticipate the leading divisions of the general mass of legislation.

Having given the definitions of these cardinal points, we will now notice some of their fundamental divisions.

The primary division of Rights, the one most necessary for forming clear conceptions on the subject, a division which, as far as my acquaintance with juristic literature extends, Austin was the first to make clear and luminous, is the division into Sanctioned rights and Sanctioning rights. This division of rights depends on a corresponding division of the Titles to which they are annexed.

Sanctioned, or primary, or final rights, are such rights as exist antecedently to any Wrong, rights whose Title or origin from which they spring, and which defines the person on whom they are conferred, is some circumstance other than a Wrong. Sanctioning, secondary, or instrumental rights, are rights engendered by a Wrong committed by some other person, rights conferred upon a person whose title to them is the fact that he has suffered a Wrong.

Wrong is the violation of right or duty, and may be defined as disobedience, intentional or negligent, to the command of the sovereign, entitling the wrongdoer to the Sanction, that is, to the evil threatened by the lawgiver. Examples of Sanctioned rights are the right of a proprietor to enjoy the fruits of ownership, the right of a contractor to the performance of the promise made by the person with whom he contracted, the right of every respectable member of society to have his honour unstained, his character

unimpeached. The corresponding Sanctioning rights, or rights of the injured party to redress, are the right of the dispossessed proprietor to be reinstated in possession, the right of the deceived contractor to have damages for non-performance or to have specific performance enforced by the court, the right of the slandered person to recover damages for slander.

The divergence of Rights into two classes, rights antecedent to wrong, and rights consequent on wrong, which we have referred to a divergence of Titles, flows immediately from the essence of Law, and may be deduced from its definition.

The essence of every Law is the injunction or prohibition of some given act and the menace of an evil in the case of non-compliance. Every law, that is to say, is at once Imperative and Punitory; it is only Imperative by being Punitory. So far as law is Imperative, it confers primary or sanctioned rights, and imposes primary or sanctioned duties; so far as it is Punitory, it confers secondary or sanctioning rights, and imposes secondary or sanctioning duties. A primary obligation may be defined as the burden imposed by the law in its first or imperative clause; a secondary obligation as the burden imposed by the law in its alternative or punitory clause.

Sanctioning rights only exist for the sake of Sanctioned rights. Accordingly, the latter may be called principal or final, the former instrumental or ancillary. So far as the existence of Sanctioned rights is dependent on the existence of Sanctioning rights, we might invert the epithets primary and secondary, which we have applied to them. I have no Sanctioned rights independently of the injunction or prohibition which declares that some act or omission is a violation of my right, and vindicates it by a Sanction civil or criminal. That is, my Sanctioned right or duty owes its existence to the injunction or prohibition of certain acts and to the remedy or punishment to be applied in case of disobedience. Accordingly, though looking at them as means and ends, we have called Sanctioning rights Secondary and Sanctioned rights Primary; yet if we looked at the order of existence, we might call Sanctioning rights Primary and Sanctioned rights Secondary.

Again, Sanctioning rights and duties are directly enforced by the courts, Sanctioned rights and duties only indirectly. Sanctioning rights and duties are not only immediately enforced, but also universally and invariably, except when there is a miscarriage of justice. Sanctioned rights and duties cannot be secured from

violation, even when the administration of justice is perfect: the sovereign can only induce, persuade, incline, to the observance of primary rights and duties, by holding out the inexorable alternative of secondary rights and duties; he cannot compel. As only secondary rights are directly enforced by the judicature, it might be alleged that these are the only genuine rights; that primary rights are merely imaginary, a fiction of philosophic jurisprudence: and it must be admitted that some secondary rights are the more prominent and constant object of the jurist than the corresponding primary rights. Thus the portion of primary rights that hereafter, as opposed to Acquired rights, we shall call Primordial rights (right to life, health, liberty, reputation, etc.) are never so much as mentioned by Gaius, nor, so far as I am aware, by any Roman jurist, but are only deducible from the corresponding Sanctioning rights, the rights that arise from violence, assault and battery, defamation, and the like. This obscuration of the Primary right in comparison with the corresponding Secondary right is, however, not invariable. The Primary rights of Status, Property, Obligation, are commonly recognized both in popular and juristic language as clearly as the corresponding Secondary rights, and we are quite justified in extending the division of Sanctioned and Sanctioning rights from these types where it is more strongly marked through the universal sphere of rights, that is, to those regions where the Primary rights have engaged a less amount of attention.

A second fundamental division of rights, common to all legislations, and ever present to the mind of Roman jurists is the division into Real and Personal, or jus in rem and jus in personam. This division of rights depends on a division of the corresponding obligations. Every right residing in one person implies the existence of another person or persons on whom a corresponding duty is incumbent. The corresponding duty is sometimes incumbent on a determinate person or persons, sometimes on persons indeterminate, in other words, on the world at large. In the former case it is usually positive, that is to say, a duty of actual performance; in the latter case it is usually negative, that is to say, a duty of abstention or forbearance. Jus in personam is a right to acts on the part of a certain person, Jus in rem is a right to forbearance on the part of all persons. Examples of Real right are Status, Franchise, Ownership: examples of Personal

right are Obligations (in a narrower acceptation than we have hitherto assumed) arising from contract or delict. Jus in rem may be defined as a right correlating with obligations at once universal and negative: Jus in personam a right correlating with obligations at once particular and positive. Jus in personam implies the relation of debtor and creditor; Jus in rem is the right of use and of prohibition; a right of dealing with a thing without interference, and of excluding from all similar dealings the rest of the world:—

> γεινομέναισι λάχη τάδ' ἐφ' ἁμὶν ἐκράνθη·
> ἀθανάτων δ' ἀπέχειν χέρας, οὐδέ τις ἐστὶ
> ξυνδαίτωρ μετάκοινος.

> 'At our birth this domain to us the Fates allotted.
> The immortals off must hold their hands,
> Nor is there banqueter our feast to share.'

It is to be observed that the expressions Jus in rem and Jus in personam are not classical. The classical expressions on which they are modelled are actio in rem, actio in personam; action to inforce a Real right, action to inforce a personal right. Jurisprudence, however, requires terms to express this leading classification of Rights, and, as such terms are not supplied by the Roman jurists, the above mentioned, as, though barbarous, they seem on the whole to be most eligible, have been adopted, and will be employed in the course of this commentary.

A third important division of Rights is expressed in the terms Jura rerum and Jura personarum, rights given by the law of Things, and rights given by the law of Persons. But we may adjourn the consideration of this division until we examine the rights of Status, as we shall immediately proceed to do, Status forming the subject of the first book of the Institutions of Gaius.

The evil which constitutes a Sanction may consist in the loss of any of the rights protected by the sovereign. It may be the privation of political rights, the privation or diminution of property, or the privation of primordial rights—incarceration, compulsory labour, banishment, death.

The motives which sway the legislator in determining the nature and amount of the sanction are various. Sometimes the motive is simply the reparation of a harm inflicted. Sometimes the apportionment of the remedy is intended as an inducement to the

aggrieved party to recur to the public judicature instead of redressing his own grievance, and, to use a common expression, taking the law into his own hands—an urgently pressing motive in the infant beginnings of society. Sometimes the end of the lawgiver is the prevention of the prohibited act by terrorism, by the menace of the sanction and the execution of the menace. Sometimes the sanction is retributive or vindictive, the expression of the conscience or moral sentiments of the society. In humane legislations a collateral end of the sanction is often the reformation of the offender: this motive is confined to sanctions of the criminal code.

To a division of Sanctions corresponds an important division of jurisprudence. Some Sanctions may be enforced or remitted at the discretion of a private party, others are enforced at the discretion of the Sovereign or state, and by the Sovereign or state alone can the liability of the wrongdoer be remitted. This founds the division of the code or statute-book into the Civil code and the Criminal code.

But even the Civil code presents, more strongly marked in Roman law than in modern systems, a similar division of Sanctions. The principal end or object of some Sanctions, as above stated, is the redress of injury in the past, compensation or indemnity to the injured person for his violated primary right; the end of others is the prevention of injury in the future, terrorism, or the deterrence of future wrongdoers by exemplary punishment of a past offender. On this division of civil sanctions is based the division of civil suits into Rei persecutio and Poenae persecutio, a suit to recover property, and a suit to recover a penalty. A judgment may be bilaterally penal, that is, may both impoverish the defendant and enrich the plaintiff; or it may be unilaterally penal, that is, may impoverish the defendant without enriching the plaintiff, e. g. in a suit for indemnification, when the defendant has not gained in proportion to the loss he has inflicted on the plaintiff. A suit which is Rei persecutio may be unilaterally penal. Bilaterally penal suits, though common in Roman law, are unfrequent in modern legislations.

The sanction of a right or obligation, whether primary or secondary, is a motive addressed to the will of the person who owes the obligation, and is the prevision or anticipation of an intending wrongdoer, that his unlawful gain will be extorted from him, and, commonly, an additional evil, loss, or pain will be in-

flicted on him by the irresistible power of the sovereign. The sanction of the primary obligation is the secondary obligation, and it is imaginable that the sanction of the secondary obligation should be a tertiary obligation, and so on; but this series of sanctioned and sanctioning obligations cannot proceed without a limit: if it did, every sanction might be defied and every obligation broken, and there would be no ultimate basis of obligation. But, in fact, the series comes to a speedy end. When once the secondary obligation is ascertained by a Judgment or Condemnation, unless this judgment is satisfied by a voluntary submission of the party condemned, the ultimate sanction soon quits the form of obligation, and presents itself in the shape of Execution, that is, of physical compulsion, to which the assent of the party obliged is immaterial. Indeed, in the criminal code we can scarcely speak of primary and secondary obligation, as the sanction usually in the first instance assumes the form of physical compulsion.

One species of Titles and the most important deserves a more particular consideration—the Titles which consist of human action.

Human acts are either lawful or unlawful. All unlawful acts of course are titles, that is, originate obligations, whether as contravening the Civil code they are Torts, or as contravening the Criminal code they are Crimes.

Of lawful acts only those are titles, or originate obligations, which are designed to produce this effect, and these actions are called by the distinctive name of Dispositions. Dispositions (the Rechtsgeschaefte of the Germans), then, are permitted actions intended to generate or extinguish obligations. Dispositions such as Testation or Bequest, to make which a single person is competent, may be called unilateral: Dispositions such as Contract and Alienation, which require the concurrence of two persons (promissor acceptor, grantor grantee) who take opposite parts, may be called bilateral.

Let us consider some of the contrasts of Wrongful acts (torts or crimes) and Dispositions.

A Disposition produces in the first place a primary obligation: a Wrong produces in the first place a secondary obligation.

Every Disposition involves Intention: a wrong may involve either Intention or Negligence.

Both in Wrongs and in Dispositions the Intention must be accompanied by some external act: the mere intention to offend is

not punishable without an Overt act, and the mere intention to dispose without execution produces no legal effect. But the overt act which clothes the wrongful intention must have a physical character, must be some change in the material universe: the external act in which a Disposition is incorporated may be merely, and usually is merely, a Declaration, whether Formal, that is, a manifestation of intention by some symbolic act prescribed by positive law, or Formless, that is, a manifestation of intention by any mode which the disposer chooses to adopt. In Roman law there is, however, this distinction between Dispositions that produce jus in personam or obligation and those that produce jus in rem or dominion, that jus in personam is produced by mere declaration; jus in rem generally requires in addition to declaration a certain physical accompaniment, namely, Tradition.

A further comparison of Wrongs and Dispositions will be facilitated by the employment of certain logical formulas, of which some readers may require a brief explanation.

Every legal phenomenon may be presented in the form of a syllogism; that is, may be analysed into three terms, and it is useful to accustom ourselves to the analysis. A syllogism, it is hardly necessary to say, is resolvable into three terms, whose combinations compose three propositions, a major premiss, a minor premiss, and a conclusion. In the major premiss the major term is found to be connected with the middle term; in the minor premiss the middle term is found to be connected with the minor term: in the conclusion the minor term is from these data inferred to be connected with the major term. If the major, middle, and minor terms are respectively represented by the letters A, B, C, the following symbols will give the formula of the syllogism:

Major premiss:	all	B is A;
Minor premiss:		C is B;
Conclusion:	therefore	C is A.

In the juristic syllogism the middle term B represents a Title, i.e., a class, a category, or condition, to which the legislator has annexed certain legal consequences, certain rights or obligations; which are represented by the major term A; the major premiss, all B is A, representing the law. The minor term C represents certain particular persons, plaintiff or defendant, as characterised by certain acts or omissions, volitions and knowledge: and the minor premiss,

C is B, asserts that such actions or omissions bring these parties under the category represented by B. The consequent rights or duties of such individual persons are expressed in the conclusion, C is A.

Resuming now our comparison of Wrongs and Dispositions, but confining ourselves to intentional wrong (dolus), we observe that both in Wrongs and in Dispositions the middle term B of the above syllogism is *intended* (an object of the intention of the offender or disposer C): only in Dispositions the major term A as well as the middle term B is intended. The wrongdoer desires, purposes and intends an event which happens to be one of the Titles B in the penal code; but, though undeterred by the menace of the legislator, by no means desires or intends the consequences A which that code annexes to B. These, on the contrary, he wishes and hopes to avoid. The major term intended in the syllogism which instigates his action is some other motive, some pecuniary advantage, or some pleasure to be gained, or some painful passion to be assuaged. In a Disposition, on the contrary, the law, the major premiss, B is A, of the forensic syllogism, is a premiss in the practical syllogism which determined the disposer to the step he takes. His immediate intention is to bring himself under the category B, a Title of the civil code; but he only cares for B as an instrument or means to some legal end, as a valid Title whereby he can establish certain rights and duties: his ulterior and principal intent is by means of B to link himself or some other person to the category A.

Both in Wrongs and in Dispositions, to constitute a perfect Title that shall generate an obligation, there must be an accord between the intention and the external manifestation. In dolose Wrong the intention must accord with the overt act: in unilateral Disposition the intention must accord with the Declaration: in bilateral Disposition there must be a further accord between the intentions of the two disposers; the intention of the promissor must accord with that of the promissee; the intention of the alienor must accord with that of the alienee.

From the preceding it appears that the theory both of Wrongs and of Dispositions must be based on a precise conception of the nature of Intention. Intentional wrongs, however, are not the sole means by which a person incurs penal obligation. The acts imposing secondary obligations are said to be imputable, and for such acts the agent is said to be liable, answerable, responsible, ac-

countable. The grounds or conditions of Imputability are Intention (dolus) and Negligence (culpa), 3 § 211. We require, therefore, the definitions of Intention and Negligence.

Desires or wishes either attain their objects immediately and instantaneously, or only by the intervention of other objects antecedently attained. The antecedent object is called a 'mean,' the consequent or mediate object is called an 'end.' If no object were immediately attainable, if every mean had to be reached by an antecedent mean, if the regression of previous conditions was unlimited, all desire would be futile and no end could ever be attained. There must be, then, some primary mean, some limit to the series of antecedent conditions, some objects of desire attained by a wish. What is the nature of these objects, and what is the name of the wish by which they are evoked?

The only objects that man can realize by a wish are the muscular movements of the bodily organs.

Greek psychology does not appear to have had a proper name for the wish which produces a movement of the limbs. Doubtless, the words ὄρεξις and ὀρεκτόν apply to these wishes and their objects, but they apply equally to ulterior ends or motives, and we want a term to signify exclusively and distinctively the primary mean. Again, προαίρεσις (resolve or resolution) denotes the desire of an original mean, but only one species thereof, namely, desire preceded by deliberation or premeditation, and we are seeking for a name of all desires that are immediately fulfilled, whether premeditated or unpremeditated, whether the counsel of reason or the impulse of unreflecting passion. For this purpose Will and Volition seem to be the most appropriate words that the English language offers. Though applicable without impropriety to distant ends, they are perhaps more commonly applied to means, and in particular to the command we exercise over our bodily frame. We say that we will a movement, that the limbs obey the will, that a bodily movement follows instantaneously upon a volition. Over whatever regions the dominion of the Will may be extended, the direct origination of motion in the limbs is its earliest manifestation, and continues its principal function to the end of life. Wanting, then, a term to denote the wish of an original mean, or rather of an object attainable without the intervention of means, we take the generic term Will or Volition, and give it a specific signification, denoting thereby the desire or wish which is immediately fulfilled, whether such wish be the

aimless dictate of a passing emotion or initiate the execution of a many-stepped or many-staged and long-considered plan.

Having fixed the meaning of Volition, we have materials for the definition of Intention, which is a correlative of Volition. In popular language Intention always implies the contemplation of an end. As a condition of responsibility it denotes the contemplation of the immediate consequences of those muscular movements which are the objects of Volition or determined by Will. The simplest action is a complication of a multitude of muscular movements produced by a multitude of Volitions. Suppose that certain complicated muscular movements, the lifting of a pistol, the taking aim at a man, the pulling the trigger, are the antecedents of a certain event, namely, that a man is shot. If this end was contemplated, the shooting was intentional. Intention is the contemplation of the consequence or end of bodily movements, and the belief or expectation that it will ensue. Or we may define it the combination or co-ordination of bodily movements to a contemplated and expected or anticipated end.

Intention sometimes denotes a remote or ulterior end, the ultimate motive of a series of subordinate ends; but for our present purpose it is confined to the immediate consequences of those muscular movements which are the objects of Volition. These consequences, according to our definition of Will, are not willed, but intended. The movements, being consequences of the volitions, that is, standing to them in the relation of end to mean, may be said to be both willed and intended. In the generic sense of Will and Volition, the consequent is wished, desired, willed (*ὀρεκτόν, αἱρετόν*) as well as the antecedent. Two cases may be distinguished: the consequent may be the very motive or inducement of an act, and then without doubt it is desired: or it may be of itself regarded with aversion, and occasioned with reluctance, and willed only so far as it is the inexorable condition of some other event which has been determined. But even in this case it may be said to be desired: it is a mischief which the actor would fain avoid inflicting, but he prefers to cause it rather than forego some other object which he has resolved to attain. (So Aristotle decides in the case of the throwing overboard of cargo to save a ship from wreck, Eth. Nic. 3, 1.)

Intention being defined, Negligence, the negation of intention and alternative ground of responsibility, will be more easily comprehended. An actor is negligent when he is ignorant of the

consequences of his act, if his ignorance proceeds from thoughtlessness, recklessness, carelessness, want of due attention. Negligence is inadvertence to consequences to which a man might have adverted, and to which he would have adverted had be been desirous to obey the law and perform the obligations which it imposes. As obligation may either consist in performance or forbearance, so the negligent breach of obligation, which we have always spoken of hitherto as if it always consisted in commission, may be either commission or omission. The word Negligence, indeed, most properly designates inadvertence to the consequences of omission or inaction. Inadvertence to the consequences of commission may be called heedlessness. If the mischievous consequences of an act are adverted to, but on insufficient grounds are not expected to follow, the neglect of precaution is called temerity or rashness.

The foregoing definition of Intention agrees with that given by Aristotle, except that, instead of singling out one element, the consequences, as the object of consciousness, he requires that all the elements of an action, the consequences, the degree of force, the instrument, the patient or subject, the agent, the act, should be present to the mind of the actor, in order to make his conduct intentional; although of these ingredients the consequences are admitted to be one of the most important. *ὄντος δ' ἀκουσίου τοῦ βιαίου καὶ δι' ἄγνοιαν, τὸ ἑκούσιον δόξειεν ἂν εἶναι οὗ ἡ ἀρχὴ ἐν αὐτῷ, εἰδότι τὰ καθ' ἕκαστα ἐν οἷς ἡ πρᾶξις*, Ethica Nicomachea, 3, 1, 20. (So far the definition only includes the Intentional. To make it coextensive with the Imputable we must complete it by adding *καὶ ὅσα δι' ἀμέλειαν ἀγνοεῖν δοκοῦσιν*, ibid. 3, 5, 9, or, *καὶ ὅταν ἐν ἑαυτῷ ἡ ἀρχὴ ᾖ τῆς ἀγνοίας*, ibid. 5, 8, 7). 'That is involuntary (unimputable) which is caused by external compulsion or by ignorance. That is Voluntary (imputable) whose cause or beginning is internal (Will, Volition) with a knowledge of the individual ingredients which constitute the action, or without this knowledge, if the ignorance is produced by negligence—if the agent is to blame for his ignorance.' Or we may make the Voluntary inclusive of Negligence and coextensive with the Imputable by dividing Knowledge, with the writer of the Eudemian Ethics, into actual knowledge, and possible knowledge. *ἐπεὶ δὲ τὸ ἐπίστασθαι καὶ τὸ εἰδέναι διττόν, ἓν μὲν τὸ ἔχειν, ἓν δὲ τὸ χρῆσθαι τῇ ἐπιστήμῃ, ὁ ἔχων μὴ χρώμενος δὲ ἔστι μὲν ὡς δικαίως ἂν ἀγνοῶν λέγοιτο, ἔστι δ' ὡς οὐ δικαίως, οἷον εἰ δι' ἀμέλειαν μὴ ἐχρῆτο . . . ταῦτ' οὖν προσδιαιρετέον*, Ethica Eudemia,

2, 9. 'To know or be aware has two meanings, to have knowledge and to use knowledge; so that a man who has knowledge and does not use it may be justly said in one sense not to know, in another sense to know, if he fails to use it from negligence. . . . This distinction, then, must be added to complete the definition of the voluntary.' The Intentional, then, might be defined to be, that which is desired and caused with an explicit knowledge that it would be caused, or, with an explicit knowledge of its component elements.

Intention (dolus) is either hasty intention (exemplified in ἀδίκημα), including actions impelled by any appetite or emotion, or deliberate intention (exemplified in ἀδικία), denominated Resolve or Resolution (προαίρεσις). προαιρετὸν τὸ ἑκούσιον τὸ προβεβουλευμένον, Ethica Nic. 3, 2, 17. 'That is resolved which is voluntary and premeditated.' ἡ προαίρεσις ἂν εἴη βουλευτικὴ ὄρεξις, ibid. 3, 3, 19. 'Resolution is deliberate volition.'

Negligent violation of the law (culpa, ἁμάρτημα) is distinguished, on the one side, from misadventure (casus, ἀτύχημα), and, on the other, from intentional violation of the law (dolus, ἀδίκημα), which again is distinguished from deliberate violation of the law (ἀδικία). τριῶν δὴ οὐσῶν βλαβῶν τῶν ἐν ταῖς κοινωνίαις, τὰ μὲν μετ' ἀγνοίας ἁμαρτήματά ἐστιν, ὅταν μήτε ὅν, μήτε ὡς, μήτε ᾧ, μήτε οὗ ἕνεκα ὑπέλαβε, ταῦτα πράξῃ . . . ὅταν μὴ παραλόγως ἡ βλαβὴ γένηται . . . ὅταν δὲ εἰδὼς μὲν μὴ προβουλεύσας δέ, ἀδίκημα . . . ὅταν δ' ἐκ προαιρέσεως, ἄδικος καὶ μοχθηρός, ibid. 5, 8. 'Of the three gradations of misconduct towards others, Fault or Negligence (culpa) is an unlawful act in ignorance of the subject, the degree, the instrument, the consequences, when it was reasonable to expect the mischief; unlawful intention (dolus) is breach of law with knowledge of these elements, but without premeditation; malice or depravity is evinced by the resolution or deliberate intention of violating law.'

The distinction between Negligence and Intention, and between hasty and deliberate intention, is not so important in the civil code as in the criminal code and in the eye of the moralist. The criminal code punishes less severely wrongs of inadvertence and crimes committed under provocation. But the thoughtless, incautious, imprudent, author of unlawful mischief, although he intended no harm, is just as accountable, chargeable, liable to the sanction of the civil law, and compellable to make reparation, as if his infraction of law was intentional.

Dolus being defined to be knowledge or consciousness of certain

facts, and culpa ignorance or unconsciousness of the same facts, are clearly two states of mind which must always be opposed. No degree of culpa will pass into dolus. Yet several expressions of the jurists imply the contrary: e.g. Magnam tamen negligentiam placuit in doli crimen cadere, Dig. 44, 7, 1, 5. 'Gross negligence is open to the charge of fraudulent intention.' But these statements only mean that dolus and culpa are often undistinguishable by a court of law. The phenomena of gross negligence are precisely similar to those of dishonest intention, and it is often impossible for a court to decide which interpretation they ought to bear. Again, as the consequences are equally mischievous, there is no reason why they should not be subject to the same legal sanction.

In its signification of deliberate intention Dolus is often used as an antithesis of violence and a synonym of Fraud. The reason of this is obvious. He who can attain his ends by force does not trouble himself with machinations and artful schemes. Wiles and plots, when their object is unlawful, usually imply an absence of violence and accompany manœuvres to surprise consent. It is in this sense that Dolus is defined by Labeo. Labeo sic definit: dolum malum esse omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum adhibitam, Dig. 4, 3, 2. 'Labeo defines dolus malus as any craft, imposition, machination employed to overreach, delude, deceive, another.' There is, however, no necessary antithesis between deliberate intention and violence, and we find that the edict, Si cui dolo malo hominibus coactis damni quid factum esse dicetur, Dig. 47, 8, 2, 'Mischief with dolus malus by men assembled is subject to the same penalty as Rapine,' uses the term to signify premeditated violence.

There are three principal manifestations of Dolus, a conscious or intentional infraction of law: (1) delict, or the violation of a jus in rem, accompanied or unaccompanied with violence or intimidation, and possibly without any treachery or betrayal of confidence, e.g. theft or robbery; mala fides, involving a violation of the confidence necessary to social intercourse: and then either (2) the deliberate violation by a debtor of a jus in personam or obligation imposed by contract; in which case Dolus is opposed to Culpa and Casus: or (3) any unlawful machination or circumvention leading another person to a manifestation of Will, whether bilateral, as a contract, or unilateral, as a testamentary disposition, or the acceptance or disclaimer of a succession, &c. Dolus in this form is often

called Fraud (fraus); it is ground to support an actio doli and in integrum restitutio on account of dolus.

Malice in English law appears to denote deliberate intention, or rather the depravity of disposition or badness of heart (ἀδικία) which is assumed to be evidenced by a deliberate unlawful intention. Such at least is its meaning in the definition of murder. Perhaps, however, it sometimes only denotes unlawful intention (ἀδίκημα), and, as rather belonging to the criminal than the civil code, it may be regarded as equivalent to criminal intention.

In the foregoing analysis of Intention, we have chiefly considered it as an ingredient in Torts and Crimes. As entering into Disposition, Intention has essentially the same character: that is to say, we must distinguish two stages in an act of will: an imperfect stage which may be called Volition, or an act of will unaccompanied by knowledge of certain facts; and a perfect stage which may be called Intention, or an act of will when accompanied and extended by such information. There is only this difference, that Offences are physical actions, and the Volition and Intention involved in them relate exclusively to muscular movements and their immediate consequences: in the analysis of Disposition we must substitute for Austin's statement the broader statement of Aristotle, and consider that the Volition and Intention which belong to the essence of Disposition relate, not, like those which enter into torts and crimes, to a muscular act and the result which it produces, but to an external declaration (incorporation) of an intended disposition, and either to (A) the whole disposition or to (B) certain of the essential elements of the disposition. This may be illustrated by examples.

A. Of dispositions null and void (wanting the essence of true dispositions) because Intention is excluded by error relating to the whole disposition we have an instance when a man signs one document believing it to be another.

B. The essential elements in respect of which an error excludes Intention and avoids the disposition are (1) the Right to be created by a disposition, (2) the Person to be invested with a right by a disposition, (3) the Thing to be transferred by a disposition.

1. There is an error in the Right to be created when a promissor means a loan and the acceptor means a donation, or vice versa.

2. There is an error as to the Person who is the object of a disposition: in a devise, if the testator names one person as devisee

when he means another: in a marriage, if one goes through the ceremony with a person other than he supposes: in a donation, when a donor gives a thing to a person who falsely personates the intended donee: in a contract, when an order for a work of art is given to a person who falsely personates an eminent artist.

3. Error respecting the Thing to be conveyed is called (*a*) error in corpore when it relates to an individual thing; as when there is a misunderstanding between buyer and seller or other contractors as to the specific thing to be conveyed; and this avoids the contract. When a Quantitas, that is, a thing only generically determinate is to be conveyed, a misunderstanding sometimes avoids a contract, sometimes leaves a valid contract for the lesser of the two quantities intended.

(*b*) Sometimes error respecting the Qualities of the thing to be conveyed, called inappropriately error in substantia, is held to be essential and avoids a disposition: thus a buyer may think a bronze vessel to be golden, or a leaden vessel to be silver, or vinegar to be wine, or a female slave to be a male slave. In such cases, whenever the difference of quality in the judgment of the mercantile world would make a commodity different in kind, the error is essential: when the difference does not amount to a difference in kind, the error is held to be non-essential and does not avoid the disposition.

Other errors than these three, however closely they may be connected with a disposition, and though they may have been the principal inducements thereto, are unessential or immaterial and leave the disposition valid. Only testamentary dispositions are in some cases invalidated by an error in Motive. E. g. the institution of a person as successor because a previously instituted successor or an intestate successor is falsely believed to be deceased: the institution of a person as successor because he is falsely believed to be a relative: the disinheritance inter ceteros of a son because he is falsely believed to be dead: the bequest of property belonging to a stranger which the testator believes to be his own; all these testamentary dispositions are invalidated by error.

Sometimes Error, though it does not operate so far as to invalidate a disposition, yet entitles the disposer to relief at the hands of the tribunals, particularly if it was produced by the fraud (dolus) of another party. In most countries the mitigation of the strict legal consequences of dispositions is the work of that branch of the judicature which administers what is called Equity in contrast with the tribunals that administer the more rigorous rules of law (jus

ipsum). In Rome such relief was given by the praetor in his equitable capacity under the forms of Exceptio, Actio, In integrum restitutio, the natures of which will appear in the course of this treatise. It was sometimes, however, given by the courts of civil law (jus strictum); for instance in the action called condictio indebiti soluti. If a person aliened property in the mistaken belief that he was under an obligation to do so, he could recover it back in the courts of civil law by this action, which belonged to the class of personal actions and claimed a reconveyance of property. The nature of the remedy indicates that the error of fact had not invalidated the alienation. Otherwise the remedy would not have been a condictio claiming a retransfer, but a vindicatio, a real action, contending that the property had never been effectually aliened, that the attempted transfer was inoperative.

We have seen that ignorance of the specific constituents of an action is a ground of exculpation. This must not be extended to ignorance of the obligations to which a person is subject under certain circumstances, or of the sanctions by which these obligations are enforced. Hence the maxim that a party in a suit may allege ignorance of fact, but cannot allege ignorance of law. Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere, Dig. 22, 6, pr. Sciant ignorantiam facti non juris prodesse, nec stultis solere succurri sed errantibus, ibid. § 5. 'The rule is, that law is known to everybody at his own peril, facts are not known to everybody at his own peril.' 'Ignorance of fact may be pleaded, not ignorance of law; and relief is accorded to error, but not to stupidity.' The rule is founded on expediency. It would be impossible for a court to decide whether a party was really ignorant of the law, or, if this could be determined, whether his ignorance was inevitable or the effect of negligence. From the impossibility of deciding such a plea, it is not allowed to be pleaded, and ignorance of law is always assumed to be a case of Negligence, and unworthy of the sovereign's relief.

This distinction of Roman jurisprudence is parallel to one indicated by the Grecian moralist. *Οὐ γὰρ ἡ ἐν τῇ προαιρέσει ἄγνοια αἰτία τοῦ ἀκουσίου ἀλλὰ τῆς μοχθηρίας, οὐδ' ἡ καθόλου, ψέγονται γὰρ διά γε ταύτην, ἀλλ' ἡ καθ' ἕκαστα ἐν οἷς καὶ περὶ ἃ ἡ πρᾶξις.* Eth. Nic. 3, 1. 'An act is made involuntary neither by ignorance of the primary ethical laws, which rather shows utter badness of will (dolus); nor by ignorance of general propositions, which also (as

proceeding from negligence) is blameable (culpa); but by ignorance of the essential elements and cardinal points of the particular action.' [προαίρεσις here denotes the major premiss (ὀρεκτικὸς νοῦς, Eth. Nic. 6, 1), not the conclusion of deliberation (ὄρεξις διανοητική) which is the signification defined, Eth. Nic. 3, 3.]

The parallelism however is not complete between the moral and civil code. Ignorance of a civil law is regarded as negligence by the civil code, and therefore men are not protected from the civil disadvantages they incur in consequence of an ignorant disposition. In the moral code ignorance of law is something worse than negligence; for as the moral laws are merely the dictates of a well-disposed will, e.g. such and such actions are detestable, ignorance of these laws implies an evil will, i.e. is not culpa but the worst form of dolus (ἀδικία, πονηρία). There is a closer parallelism between the moral code and the criminal code. In the latter the character of certain acts depends on a complication of civil and penal law, and ignorance of these respective elements is very differently treated by the legislator; e.g. the offspring of a female slave in whom a man has a usufruct (life estate) belongs not to the usufructuary (tenant for life) but to the reversioner. If then the usufructuary appropriates such offspring, is he guilty of Theft and subject to the sanction annexed to Theft in the criminal code? Not if he was ignorant of the purely civil law that assigns to the reversioner the property in the issue of a usufructuary slave, for such ignorance is sufficient to exclude intentional misappropriation. Again, if the usufructuary seized and carried off with violence the progeny of the slave, he would not be liable for Rapine, which involves dolus, but he would be liable to the interdict against Violence, and would not be allowed to plead ignorance that the violent removal of one's own property was interdicted. Again, the defendant in a rei vindicatio or hereditatis petitio is liable to certain penalties for mala fide possession, and cannot plead ignorance of this penal law: but may plead ignorance of some purely civil law respecting property or succession, and show that such ignorance made him a bona fide possessor. The criminal code, then, admits the plea of ignorance of civil law; but does not admit the plea of ignorance of the criminal law itself; that is, of the law prohibiting and punishing Theft, Violence, and Mala fide possession. It does not admit any more than the moral code that such ignorantia juris excludes the existence of dolus or deliberate wrong.

The knowledge of law, however, which everybody is presumed to possess, does not exist as a matter of fact, even among the well-disposed. All systems of law are more or less irrational, and contain many provisions which are hardly surmisable by any but professional lawyers. To mitigate the injustice that the maxim would often produce, the Roman jurists admitted an exception in favour of women, minors below the age of twenty-five, and soldiers. These classes were permitted to plead ignorance of the law, except the obvious dictates of Natural law, and were relieved against the forfeitures and obligations thereby incurred. These classes were excused for ignorance of the more positive and arbitrary portions of the penal code. Thus women and minors are excused for ignorance of the incestuous nature of marriage with collaterals; but are not excused for violating the law against marriage with ascendants or descendants, a law which is a precept of jus gentium.

Besides the term Ignorance or Error, the above-quoted definition of the Voluntary and Involuntary contains the term Force (Vis); we accordingly require a precise conception of Force. Force is of two kinds, Vis absoluta, and Vis compulsiva. Vis absoluta is physical force, superseding the Volition of the agent in the production of an effect; as, for instance, when a person forces another to sign a document by holding and guiding his hand; and such force makes an act Involuntary. Vis compulsiva, Compulsion or intimidation (metus), e.g. inducing a man to sign by means of threats, leaves an action Voluntary. Of such cases Aristotle says: *μικταὶ μὲν οὖν εἰσὶν αἱ τοιαῦται πράξεις, ἐοίκασι δὲ μᾶλλον ἑκουσίοις.* Eth. Nic. 3, 1. 'Such acts have a mixed character, but if we are driven to decide we must pronounce them to be Voluntary.' Here again we find an exact accordance between philosophic speculation and Roman jurisprudence, and, speaking of such cases, the Roman jurist says with admirable precision, Coactus volui: i.e. It was under duress, perhaps, but the fact remains that finally the will assented, and the action must be regarded as Voluntary. Si metu coactus adii hereditatem, puto me heredem effici, quia, quamvis si liberum esset noluissem, tamen coactus volui. Sed per praetorem restituendus sum ut abstinendi mihi potestas tribuatur. D. 4, 2, 21, 5. 'If fear compelled me to declare that I accepted a succession, I really became the successor, because, though in the absence of danger I should have declined, yet under duress I have

accepted. The praetor, however, will rescind my act, and restore me to my former position and power of abstention.' Such actions are both Volitional (for the motor organs are set in motion by Volition) and Intentional, for Volition is accompanied by full knowledge of the character and consequences of the motion produced. Accordingly the Force that enters into the definition of the Voluntary and Involuntary is limited to Vis absoluta and is thus defined: *βίαιον δὲ οὗ ἡ ἀρχὴ ἔξωθεν, τοιαύτη οὖσα ἐν ᾗ μηδὲν συμβάλλεται ὁ πράττων ἢ ὁ πάσχων*, ibid.; or, *ἔοικε δὴ τὸ βίαιον εἶναι οὗ ἔξωθεν ἡ ἀρχὴ μηδὲν συμβαλλομένου τοῦ βιασθέντος*. ibid. 'Force that makes involuntary is an external efficient, causing an action without the concurrence of the Volition of the agent or, as he may be called, the patient.'

Although Compulsion does not exclude Volition and Intention, and consequently avoid a disposition, still, as we saw was the case with Error, it may entitle the victim to relief: the terms, however, in which the legislator promises relief imply that a Compulsory disposition is originally valid and operative, and, in order to be made null and void, requires to be rescinded: Ait praetor, Quod metus causa gestum erit ratum non habebo. D. 4, 2, 1. 'Dispositions made under the influence of intimidation shall be rescinded (by Exception, Action, or Integral restitution).' The term Gestum or Negotium gestum is only applied to valid dispositions, and, indeed, as was observed, an invalid or inoperative disposition would not require to be rescinded by the supreme minister of justice.

The last general term that we propose to notice is Institution. An Institution (e.g. Property, Obligation, Slavery, Tithe, Advowson) is the same thing as a Right or Obligation, but the one is abstract, the other concrete. The relations of Institutions to Rights and Obligations may be elucidated by the syllogism we have already indicated. An Institution is the major term A, as the predicate of the major premiss, or as existing in the abstract sphere of the law: a Right or Obligation is the same major term A, as the predicate of the conclusion, or as existing in the concrete sphere of fact. Or perhaps with equal propriety we may identify Institutions (e.g. Alteration of property by tradition, Imposition of obligation by written contract, Acquisition of an inheritance by descent), with the middle term B as subject of the major premiss, i.e. as having a permanent existence in the universal law: the same middle term B as predicate of the minor premisses, i.e. as

having a transitory existence under special limitations of time and place and persons, is a Title. (Compare Savigny, System, § 384.) In either case the term Institution connotes constancy and permanence, just as when it is used in another sense to denote the monarch, or legislative body, or tribunals, or any other permanent organs destined to perform certain constantly recurring functions.

If we are asked, what in Jurisprudence are the ideas corresponding to the categories of Substance, Quality, Quantity, Relation, or whatever else Logicians make the immutable framework of their science, we must point to some of the above abstractions—Law, Sovereign, Sanction, Obligation, Title. Without these and similar conceptions no jurisprudence can be imagined. And to this extent the bases of jurisprudence are natural and unchangeable, but to this extent only. Jurisprudence has nothing corresponding to the precise and unalterable special conceptions that furnish the first principles of the mathematician. All the particular institutions that fall under the above-named highest categories are positive, that is, arbitrary and variable. While Dogmatic jurisprudence fixes its attention on whatever is most constant or most perfect in legislative arrangements or what might be found in an ideal state, Historic and Comparative jurisprudence chiefly bring before our notice what is variable in civil institutions. Let us now throw a rapid glance over Roman law in order to indicate the extent of these mutations in its civil code, though in so doing we shall be forced to use by anticipation certain technical terms whose explanation must be left to the course of the following treatise.

It is unnecessary to dwell on the mutations in the code of Procedure, that is, in the forms of Action, or modes prescribed by the legislator for the enforcement of sanctioning rights.

The Substantive code may seem more permanent, but this too changes entirely in the fundamental conceptions of its titles and institutions.

Forms of Disposition, i. e. the voluntary Titles by which the subject may establish certain rights and obligations put within his reach by the sovereign, disappear after flourishing for centuries, like types of animal life. New ones are introduced and old ones are abolished. Witness the abolition of Testamentum comitiis calatis, Confarreatio, In jure cessio, Nexum, Mancipatio, Literal obligation, and the introduction of the corresponding forms of later law.

Not only do Titles change; the Rights and Obligations linked to these Titles are transformed in their fundamental conception. A glance at the law (1) of Family, (2) of Property, (3) of Succession, (4) of Obligation will convince us of this.

(1) The loss by paterfamilias of the power of life and death over wife and children was an essential change in Manus and Patria potestas. The introduction of tutor dativus and tutor Atilianus did not affect the nature of Guardianship: but its change from a private right (jus ac potestas) to a public duty was a transformation of its essence.

(2) The abolition of Mancipatio and In jure cessio and the extension of the period of Usucapio did not change the idea of Ownership; but at an earlier period society was revolutionized when common ownership was superseded by private ownership.

(3) The substitution of written instead of oral wills, and the introduction of military or privileged wills, did not change the nature of the right of Testation: but the earlier change from the Comitial to the Mancipatory will was essential; for whereas before to exclude intestate devolution an act of the legislature was required, afterwards a solemn Disposition by a private individual sufficed. Again, the nature of a universal Trust (fidei-commissum) instituted by the Senatus-consultum Trebellianum was not essentially changed by the Sc. Pegasianum: but the introduction of Codicils was an essential change in testation; for it introduced partial dispositions in a sphere where formerly the legislator only permitted universal dispositions. And Justinian's benefice of inventory, entirely changing the character of the heres, was another fundamental change in hereditary succession.

(4) Promises assumed a new character at the prehistoric period when they passed from the moral to the legal code; and after the historic period obligations continued to be modified in proportion as the growing ascendency of aequitas over jus strictum enabled the tribunals to conform more closely to the presumable intentions of a wise legislature. But the most remarkable innovation in this department was the modern invention of paper obligations (papers payable to the bearer or holder), whereby obligation, otherwise incapable of detachment from the person of the original creditor, became as transferrible from creditor to creditor as property is from proprietor to proprietor. (See Ihering, Geist des Roemischen rechts, on the variability of the institutions of the civil code.)

DE IURE GENTIUM ET CIVILI.

§ 1. *Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quis*que populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium ip*sius civitatis; quod vero naturalis* ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. quae singula qualia sint, suis locis proponemus.

§ 2. Constant autem iura ex legibus, plebiscitis, senatusconsultis, constitutionibus Principum, edictis eorum qui ius edicendi habent, responsis prudentium.

§ 3. Lex est quod populus iubet atque constituit. plebiscitum est quod plebs iubet atque constituit. plebs autem a populo eo distat, quod populi appellatione universi cives significantur, connumeratis *etiam* patriciis; plebis autem appellatione sine patriciis ceteri cives significantur. Unde olim patricii dicebant plebiscitis se non teneri, quia sine auctoritate eorum facta essent. sed postea lex Hortensia lata est, qua cautum est ut plebiscita universum populum tenerent. itaque eo modo legibus exaequata sunt.

§ 4. Senatusconsultum est quod senatus iubet atque constituit, idque legis vicem optinet, quamvis fu*er*it quaesitum.

§ 5. Constitutio Principis est quod Imperator decreto vel edicto

ON GENTILE LAW AND CIVIL LAW.

§ 1. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules enacted by a given state for its own members are peculiar to itself, and are called civil law; the rules prescribed by natural reason for all are observed by all nations alike, and are called gentile law. So the laws of the people of Rome are partly peculiar to itself, partly common to all nations; and this distinction shall be traced, as occasion offers, through all the branches of the code.

§ 2. Roman law consists of statutes, plebiscites, senatusconsults, constitutions of the emperors, edicts of magistrates authorized to issue them, and opinions of jurists.

§ 3. A statute is a command and ordinance of the people: a plebiscite is a command and ordinance of the commonalty. The commonalty and the people are thus distinguished: the people are all the citizens, including the patricians; the commonalty are all the citizens, except the patricians. Whence in former times the patricians maintained that they were not subject to the plebiscites, as passed without their authority; but afterwards a statute called the lex Hortensia was enacted, which provided that the plebiscites should bind the people, and thus plebiscites were made coordinate with statutes.

§ 4. A senatusconsult is a command and ordinance of the senate, and is assimilated in force to a statute, a point which was formerly controverted.

§ 5. A constitution is an ordinance of the emperor by decree,

vel epistula constituit. nec umquam dubitatum est, quin id legis vicem optineat, cum ipse Imperator per legem imperium accipiat.

edict, or letter; and was always recognized as having the force of a statute, as the statute which invests the emperor with his office confers upon him the whole power of the people.

§ 6. Ius autem edicendi habent magistratus populi Romani. sed amplissimum ius est in edictis duorum Praetorum, urbani et peregrini: quorum in provinciis iurisdictionem Praesides earum habent; item in edictis Aedilium curulium, quorum iurisdictionem in provinciis populi Romani Quaestores habent; nam in provincias Caesaris omnino Quaestores non mittuntur, et ob id hoc edictum in his provinciis non proponitur.

§ 6. Power to issue edicts is vested in magistrates of the people of Rome, the amplest authority belonging to the edicts of the two praetors, the home praetor and the foreign praetor, whose provincial jurisdiction is vested in the presidents of the provinces, and to the edicts of the curule ediles, whose jurisdiction in the provinces of the people of Rome is vested in quaestors: in the provinces of the emperor no quaestors are appointed, and in these provinces, accordingly, the edict of the ediles is not published.

§ 7. Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iura condere. quorum omnium si in unum sententiae concurrant, id quod ita sentiunt legis vicem optinet; si vero dissentiunt, iudici licet quam velit sententiam sequi: idque rescripto divi Hadriani significat*ur*.

§ 7. The answers of jurists are the decisions and opinions of persons authorized to interpret the law. If they are unanimous their decision has the force of law; if they disagree, the judge may follow whichever opinion he chooses, as is ruled by a rescript of the late emperor Hadrian.

I. § 1. Jurisprudence treats exclusively of positive law: the exclusive origin of positive law is positive legislation; the term positive legislation including both the express or direct enactments of the political sovereign, and the implied, indirect, circuitous enactments imported by the sovereign's acquiescence in the ruling of subordinate authorities.

The rules and principles denoted by the terms praetor-made law, jurist-made law, judge-made law, are only law because they are impliedly adopted, confirmed, and ratified by the silent acquiescence of the sovereign legislature.

When Roman jurists spoke of Gentile law or Natural law they intended to denote a certain portion of Roman positive law, that is, of law administered by Roman tribunals and enforced by the Roman executive. Accordingly, when Gaius speaks of Gentile law as enacted by Nature (id quod naturalis ratio inter omnes homines

constituit) and Civil law as enacted by the Roman legislature, he uses language which, though probably traditional in the writings of Roman jurists, is inappropriate and misleading; for the enactments of Nature differ from the enactments, express or tacit, of political sovereigns in many important particulars.

Austin illustrates the character of Positive or Political law by contrasting it in certain points with the law of Honour and the law of Fashion.

Unlike the purely Ethical law, or a law set by a man to himself, which has nothing in the nature of a sanction to compel him to observe it, the law of Honour and the law of Fashion have certain earthly sanctions annexed to them, whereby the party on whom the obligation is imposed is inclined to act agreeably to their injunctions and prohibitions. The transgressor of these laws is harmed in consequence of the displeasure which his breach of law provokes; and all parties obnoxious to the displeasure of the society whose sentiments and opinions constitute the law are inclined by the evil which will probably follow disobedience to act or forbear agreeably to the dictates of the law. But along with this resemblance between the law of Honour and Positive law there is the following difference. The law of Honour or of Fashion is set by an indeterminate lawgiver; a political law is set by a determinate lawgiver, a given earthly potentate. The sanction annexed to the law of Honour or of Fashion is applied against the party whose conduct deviates from the law by another indeterminate party of his own spontaneous movement; not by an assignable functionary authorized by the indeterminate lawgiver to enforce the law; not, like the sanction of political law, by a minister of justice appointed by a determinate political sovereign to execute the commands which he issues. In these respects the Natural or Gentile law of Roman jurists differs from Moral law and from the law of Opinion, and shows itself to be a genuine portion of Positive or Political law.

The organ by which the Jus gentium of the Romans was promulgated, which made it by quasi enactment a portion of Roman Positive law, was principally the Edict of the Praetor peregrinus. The relations of Roman citizens with aliens (peregrini), that is, with the members of foreign states formerly subjugated by Rome and now living under the protection of Roman law, were subject to the jurisdiction of a special minister of justice called Praetor peregrinus,

who, like the Praetor urbanus, published an annual edict announcing the principles on which justice would be administered. These principles composed Jus gentium as opposed to Jus civium. Jus gentium, that is to say, was not really, as Roman jurists imagined or represented, a collection of the principles common to the legislation of all nations, but a body of rules which the Roman praetor thought worthy to govern the intercourse of Roman citizens with the members of all, originally independent but now subject, foreign nations. Accordingly, if for the definition given by Gaius we substitute the definition 'Quod edicto suo praetor peregrinus omnibus gentibus constituit,' we shall be much nearer the truth.

Gradually the rules regulating the intercourse of citizens with aliens were extended to the intercourse of citizens with citizens, in cases where the rigorous conditions of jus civile were not exactly satisfied, and the precepts of jus gentium were transferred from the edict of praetor peregrinus to the edict of praetor urbanus.

Another organ of quasi publication, whereby the rules of jus gentium were transformed from ideal law to positive law—from laws of Utopia to laws of Rome—were the writings of the jurists, who, at first with the tacit, afterwards with the express permission of the legislature, engaged, nominally in interpreting, really in extending the law, about the time of Cicero (De Legibus, 1, 5), transferred to the edict of the praetor the activity which they had formerly displayed in developing the statutes of the Comitia and the law of the Twelve Tables.

The portion of the edict most fertile in germs of natural law would be the clauses in which the praetor announced, as he did in some cases, that he would instruct the judex, whom he appointed to hear and determine a controversy, to govern himself by a consideration of what was aequum et bonum, i.e. by his views of equity and expediency: and if any of the oral formularies of the earliest system of procedure (legis actiones) contained these or equivalent terms, such formularies may be regarded as a third source of Gentile or Natural law.

Jus civile, i.e. jus civium, was the law of the Twelve Tables, augmented by subsequent legislation, by juristic interpretation, and by consuetudinary law. The institutions of jus civile may be exemplified by such titles to property as Mancipatio and In Jure Cessio, contracts by the form of Nexum and Sponsio, title to intestate succession by Agnatio or civil relationship; while

corresponding institutions of jus gentium were the acquisition of property by Tradition, contract by Stipulation without the solemn term Spondeo, title to intestate succession by Cognatio or natural relationship. Other departments of life were not subject to parallel institutes of Civil law and Natural law, but the mutual relations of citizens with citizens as well as of citizens with aliens were exclusively controlled by Gentile law: e.g. the contracts called Consensual, such as buying and selling, letting and hiring, partnership; and contracts called Real, such as the contract of loan for use or loan for consumption.

Gentile titles to Property (jus in rem), titles which ultimately superseded civil titles, are explained at large in Book II.

In respect of Obligation (jus in personam), Gentile law may be divided into two classes, according to the degree in which it was recognized by Civil law:—

A. A portion of Gentile law was recognized as a ground of Action. To this class belong (1) the simple or Formless contracts to which we have alluded, (2) obligations to indemnify grounded on delict, (3) right quasi ex contractu to recover property when it has been lost by one side and gained by the other without any title, Dig. 12, 6, 14, and Dig. 25, 2, 25. Actions founded on this obligation to restore (condictiones), although it was a naturalis obligatio, Dig. 12, 6, 15, were as rigorous (stricti juris) as any in the Civil code. In these cases the obligatio, though naturalis as founded in Jus gentium, yet, as actionable, was said to be civilis obligatio, Dig. 19, 5, 5, 1.

The two eminently Civil spheres of the law of obligation were (1) specialty or Formal contracts, and (2) bilaterally penal suits. Yet even into these provinces Gentile law forced a partial entrance. We shall see that aliens could be parties to a Stipulatio or Verbal contract, though not by the Civil formulary, Spondeo 3 § 93; and to Transcriptio 3 § 133, and Syngrapha 3 § 134, certain forms of Literal contract; and could be made plaintiffs or defendants in bilaterally penal suits by means of the employment of certain Fictions, 4 § 37. This, however, was rather the extension of Civil law to aliens than the intrusion of Gentile law into a Civil province.

B. Other rights and obligations of Gentile law were not admitted as direct grounds for maintaining an action, yet were otherwise noticed by the institutes of Civil jurisprudence and indirectly

enforced. Thus a merely naturalis obligatio, though not actionable, might (1) furnish a ground of an equitable defence (exception): for instance, on payment of a merely natural debt the receiver has a right of retention, and can bar the suit to recover it back as a payment made in error (condictio indebiti soluti) by pleading the naturalis obligatio, Dig. 12, 6, 64; or the defendant can meet a claim by Compensatio, 4 § 61, cross demand or set-off, of a debt that merely rests on naturalis obligatio, Dig. 40, 7, 20, 2: or a naturalis obligatio might (2) form the basis of an accessory obligation, such as Suretyship (fidejussio) Dig. 46, 1, 6, 2, or Guaranty (constitutum) Dig. 13, 5, 1, 7, or Mortgage (pignus) Dig. 20, 1, 5, pr. or Novation, 3 § 176, Dig. 46, 2, 1, 1, all Civil institutions and direct grounds of action. Though these rights and obligations of Gentile law are imperfect (obligatio tantum naturalis) as not furnishing immediate grounds of action, yet, as being partially and indirectly enforced by Roman tribunals, they clearly compose a portion of Positive law.

Some Roman jurists distinguished Jus naturale and Jus gentium. Thus Ulpian denotes by Jus naturale the law governing the relation of the sexes, i.e. the relation of husband and wife, parent and children, relations anterior to political society, and without which the race would not have been perpetuated: while by Jus gentium he denotes relations that imply the existence of political society.

Modern writers would denote by Jus gentium the generally recognized principles of justice, principles which may be discovered by an induction of positive laws, that is, by a comparison of actually existing legislations, to be universally admitted, or, if not universally, by a majority or by a number of nations; while by Natural law they would denote a philosophic ideal, what might be otherwise denominated the moral law or the divine law, the law that ought to be everywhere established, though perhaps never yet adopted in actual legislation. Gaius, however, in the following commentary uses the terms Jus naturale and Jus gentium as perfectly synonymous and interchangeable.

§ 3. To explain the various sources of Roman law is to write the history of the successive changes in the centre of gravity of sovereign power at Rome. These changes are principally at first the changing relations of Populus and Plebs, at which we may take a hasty glance, as the account given by Gaius is inadequate and misleading.

There was a time when the three tribes of the Populus, the Ramnes, a Latin or Pelasgic race seated on the Palatine hill, the Tities or Quirites, a Sabine race seated on the Capitoline and Quirinal hills, and the Luceres, an Etrurian race seated on the Caelian hill, composed the whole of the Roman state. These three tribes of the Populus were divided into thirty Curiae, and the Curiae into three hundred Gentes. The heads of the Gentes or clans composed the Senate; the heads of the Families composing the Gentes constituted the popular body, or Comitia Curiata.

The Plebs or Plebes, a conquered Latin population, whose first beginnings were located in the suburbs (esquiliae) adjoining these hills, and named outsiders (exquilini) as opposed to the burgesses or insiders (inquilini), and whose large after-growth was settled by bonus Ancus on the Aventine (in memory of which Catullus calls the joint Populus and Plebs, Romulique Ancique gentem), shared the same jus privatum but not the same jus publicum, that is, were not admitted to any share of political power, and formed outside of the city a separate free but dependent corporation. At this time it was true, as Gaius says, that the Plebeians and Patricians were separate bodies.

But this was not so after the legislation of Servius Tullius, to whom is ascribed the division of the people into local Tribes, and into classified Centuries.

The local tribes, probably thirty in number, were a territorial division, including the whole population, patrician as well as plebeian, and forming the basis of the organization of the legislative assembly called Comitia Tributa.

The centuries were a division both civil and military, and the civil division was a classification of the whole population according to their fortune or census.

Those of the highest census were distributed into eighteen centuries of Knights, six patrician and twelve plebeian, which supplied eighteen corresponding centuries of cavalry.

The remainder of the population were divided into five classes, according to their diminishing census, the first class being distributed into eighty centuries, the three next into twenty each, and the fifth into thirty; and each of these classes contributed a corresponding number of centuries (companies) to the infantry, whose equipment, differing in costliness, at once indicated the branch of

the service for which they were destined and the class from which they sprang.

Each civil century had a single vote in the Comitia Centuriata, and from the number of centuries into which the classes were respectively distributed, it is obvious that in this assembly the wealthy classes had a great predominance; that is, the Comitia Centuriata was a timocratic assembly, or one in which the ascendency belonged to wealth, as the Comitia Tributa was a democratic assembly, or one in which the ascendency belonged to numbers. The Comitia Tributa were called Plebs, the Comitia Centuriata were called Populus; the enactments of the latter body were called leges, the enactments of the former were called plebiscites.

The subsequent stages in the growth of the commonalty and the changes in the centre of sovereign power are indicated by three legislative measures which demand our consideration.

B.C. 449, a lex Valeria Horatia, passed after a second secession of the plebs, enacted, Ut quod tributim plebs jussisset populum teneret, Livy, 3, 55, 'that the enactments of the Comitia Tributa should bind the populus.'

B.C. 339, a lex Publilia, carried by the dictator Publilius Philo, enacted, Ut plebiscita omnes Quirites tenerent, Livy, 8, 12, 'that plebiscites should bind all Quirites.'

A second, Ut legum quae comitiis centuriatis ferrentur, ante initum suffragium patres auctores fierent, 'that the bills proposed at the Comitia Centuriata should be sanctioned by the fathers before they were submitted to the vote.'

B.C. 287, a lex Hortensia, passed after a secession of the plebs to the Janiculum, enacted, Ut eo jure quod plebs statuisset omnes Quirites tenerentur, Gellius, 15, 27, 'that plebiscites should bind all Quirites.'

The interpretation of these apparently identical and, as it seems, imperfectly recited laws, appears to be as follows:—

By the lex Valeria Horatia the Comitia Tributa received a legislative initiative, but, to have force of law, the enactments required to be confirmed by the vote of Comitia Centuriata (Comitia Curiata, according to Niebuhr) and sanctioned by the auctoritas of the Senate.

By one lex Publilia the necessity of the confirmation of plebiscites by the Comitia Centuriata (Comitia Curiata according to

Niebuhr) was abolished, though the sanction of the Senate was still required to give them legal force.

By the second lex Publilia, Niebuhr supposes that the Comitia Curiata were deprived of their veto on the laws passed at the Comitia Centuriata, their confirmation being reduced to a formality; but it was probably merely a ratification of the existing state of the law, giving the Senate the exclusive initiative in the legislation of the Comitia Centuriata.

By the lex Hortensia, plebiscites were declared to have the force of law without requiring to be sanctioned by the auctoritas of the Senate.

After this period the Comitia Tributa and Comitia Centuriata coexisted as concurrent legislative bodies, the Comitia Tributa chiefly dealing with matters of private law, the Comitia Centuriata with public matters, such as elections and questions of peace and war or alliance.

As Rome grew in opulence, the sums fixed for the census of the higher classes of the Comitia Centuriata ceased to denote a considerable fortune, and this fact alone would divest this assembly of much of its timocratic character. Some further change supervened, introducing the Tribal division into the organization of the Comitia Centuriata; but the nature of this change is one of the obscurest questions in Roman history, and one which we have no space to investigate.

Plebiscites as well as the enactments of Comitia Centuriata were called Leges, and were named after the tribunes by whom they were carried, as the leges proper (rarely called populiscita) were named after the consul or dictator by whom they were carried. Thus Lex Canuleia, Lex Aquilia, 3 § 210, Lex Atinia, Inst. 2, 6, 2, Lex Furia testamentaria, 2 § 225, were plebiscites named after tribunes, the Lex Valeria Horatia was named after two consuls, the Lex Publilia and Lex Hortensia were named after dictators.

§ 4. The legislative power of the senate was in the time of the republic a matter of controversy. It is certain that it had a power of issuing certain administrative decrees or instructions to magistrates that was hardly distinguishable from legislation. Under the emperors matters were changed. Legislation by the Comitia, though spoken of by Gaius in the present tense, had ceased to be a reality after the time of Tiberius, and the last recorded lex was passed in the reign of Nerva. As early as the

time of Augustus the auctoritas of the senate began to be regarded as the essential process in making a law, and the subsequent rogatio of the Comitia as a mere formality, which was finally omitted. Senatusconsults, like laws, were sometimes named after the consuls who proposed them, and are sometimes even called leges: thus the measure which Gaius calls Sc. Claudianum, 1 § 84, is subsequently referred to by him under the name of lex, 1 § 86. Ulpian says, Non ambigitur senatum jus facere posse, Dig. 1, 3, 9, 'it is unquestioned that what the senate decrees becomes part of the civil law.' Of course, these senatusconsults were merely a disguised form of imperial constitution. The sovereignty had passed from both patricians and plebeians to the hands of an autocrat. A measure was recommended by the emperor in an oratio or epistola to the senate, and then proposed by the consul who convoked the senate, and voted by the senate without opposition. Even this form was finally disused. No senatusconsult relating to matters of civil law occurs after the time of Septimius Severus.

§ 5. The nature of the different forms of imperial constitution has been much controverted, and certainly varied at different periods. They may be characterized as legislative, judicial, and interpretative.

Edicts were legislative ordinances issued by the emperor in virtue of the jurisdiction appertaining to him as highest magistrate, and were analogous to the edicts of the praetors and ediles.

Decreta were judicial decisions made by the emperor as the highest appellate tribunal: or in virtue of his magisterial jurisdiction, and analogous to the extraordinaria cognitio of the praetor.

Epistolae or rescripta were answers to inquiries addressed to the emperor by private parties or by judges. They may be regarded as interpretations of law by the emperor as the most authoritative juris peritus.

The words of Gaius explaining why constitutions had the force of law seem to be imperfect, and may be supplemented from Justinian: Sed et quod principi placuit legis habet vigorem: cum lege regia, quae de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem concessit, Inst. 1, 2, 6. 'Imperial constitutions have the effect of law, because by the lex regia, whereby the emperor is invested with his office, the people confers on him all its sovereignty and power.' The lex imperii,

Cod. 6, 23, 3, was called by later jurists lex regia, in memory of the lex curiata, whereby the kings were invested with regal power. The king was proposed by the senate and elected by the Comitia Curiata, and the election was ratified in a second assembly presided over by the king; e. g. Numam Pompilium regem, patribus auctoribus, sibi ipse populus adscivit, qui ut huc venit, quanquam populus curiatis eum comitiis regem esse jusserat, tamen ipse de suo imperio curiatam legem tulit, Cic. De Republ. 2, 13. A fragment of a bronze tablet, on which was inscribed the lex investing Vespasian with sovereign powers, was discovered at Rome in the fourteenth century, and is still preserved in the capitol.

§ 6. All the higher magistrates of Rome were accustomed to issue edicts or proclamations. Thus the consuls convoked the comitia, the army, the senate, by edict: the censors proclaimed the approaching census by edict: the ediles issued regulations for the market by edict: and magistrates with jurisdiction published edicts announcing the rules they would observe in the administration of justice, the Edicts of the Praetor urbanus, Praetor peregrinus, Aedilis curulis being called Edicta urbana, while the Edicts of the governors of provinces were called Edicta provincialia. These edicts, besides being orally proclaimed, were written on white tablets (in albo) and suspended in the forum: apud forum palam ubi de plano legi possit, Probus, 'in the forum in an open space where persons standing on the ground may read.' Such an edict was always published on entering on office (est enim tibi jam, cum magistratum inieris et in concionem adscenderis, edicendum quae sis observaturus in jure dicendo, Cic. De Fin. 2, 22), and was then called Edictum perpetuum, as opposed to occasional proclamations, Edictum repentinum. A clause (pars, caput, clausula, edictum) retained from a former edict was called Edictum tralatitium, Gellius, 3, 18; and though doubtless the edicts gradually changed according to changing emergencies, each succeeding praetor with very slight modifications substantially reproduced the edict of his predecessor. In the reign of Hadrian the jurist Salvius Julianus, called by Justinian Praetoriani edicti ordinator, reduced the edict to its definitive form, and if the yearly publication was not discontinued (cf. Gaius, jus edicendi habent), at all events Julian's coordination of Praetorian law was embodied in all subsequent publications. Such was the origin of Jus honorarium (praetorium, aedilicium), as opposed to Jus civile: and from what has

preceded, it needs hardly be stated that the antithesis, Jus civile, Jus honorarium, is nearly coincident with the antithesis, Jus civile, Jus gentium.

It may be observed that Gaius does not attribute to edicts the force of a statute: and this theoretical inferiority of Jus honorarium, for after all it was only theoretical, had a vast influence in modelling the forms and proceedings of Roman jurisprudence. The remedy or redress administered to a plaintiff who based his claim on Jus civile differed from that administered on an appeal to Jus honorarium, as we shall see when we come to treat of Bonitary ownership, Bonorum possessio, Actio in factum, Exceptio. This difference of remedy preserved Jus civile pure and uncontaminated, or at least always distinguishable from Jus honorarium; but this perpetuation of the memory of the various origins of the law, like the analogous distinction of Equity and Common law in English jurisprudence, was purchased by sacrificing for an insufficient object simplicity of rule and uniformity of process.

The legislative power of the popular assembly and the absence of legislative power in the senate and praetor were marked by a difference of style in the lex and plebiscite, edict, and decree of the senate: while the lex and plebiscite employed the imperative (damnas esto, jus potestasque esto, &c.), the resolutions of the senate scrupulously avoid the imperative and are clothed in the forms placere, censere, arbitrari, &c., as if they were rather recommendations than commands: and the edicts and interdicts of the praetor are couched in the subjunctive (Exhibeas, Restituas, &c.), a milder form of imperative. Or to show that their force and operation is limited to his own tenure of office, they are expressed in the first person (actionem dabo, ratum habebo, vim fieri veto). Where he has authority to command he shows it by using the imperative, as in addressing the litigants (mittite ambo hominem, inite viam, redite, 4 § 13 com.) or the judge (judex esto, condemnato, absolvito). Ihering, § 47.

In the first period of the empire, that is, in the first three centuries of our era, it was the policy of the emperors to maintain a certain show of republican institutions, and the administration of the empire was nominally divided between the princeps or emperor and the people as represented by the senate. Thus, at Rome there were two sets of magistrates, the old republican magistrates with little real power, consuls, praetors, censors, tri-

bunes, quaestors, in outward form elected by the people; and the imperial nominees with much greater real authority, under the name of praefecti, the praefectus urbi, praefectus praetorio, praefectus vigilum, praefectus annonae, praefectus aerario; for though nominally the people and princeps had their separate treasuries under the name of aerarium and fiscus, yet the treasury of the people was not managed by quaestors as in the time of the republic, but by an official appointed by the emperor. Similarly the provinces were divided between the people and the prince, the people administering those which were peaceful and unwarlike, the prince those which required the presence of an army. The governor of a province, whether of the people or the emperor, was called Praeses Provinciae, though the title properly belonged to the governor of an imperial province. The Praeses of a popular province was a Proconsul, and the chief subordinate functionaries were Legati, to whom was delegated the civil jurisdiction, and quaestors, who exercised a jurisdiction corresponding to that of the ediles in Rome. The emperor himself was in theory the Proconsul of an imperial province; but the actual governor, coordinate with the Proconsul of a senatorial province, was the Legatus Caesaris, while the financial administration and fiscal jurisdiction were committed to a functionary called Procurator Caesaris, instead of the republican Quaestor. Sometimes the same person united the office of Procurator and Legatus, as, for instance, Pontius Pilate.

§ 7. The opinions of a jurist had originally only the weight that was due to his knowledge and genius; but on the transfer of sovereign power from the hands of the people to those of a monarch, the latter recognized the expediency of being able to direct and inspire the oracles of jurisprudence; and accordingly Augustus converted the profession of jurist into a sort of political function, giving the decisions of certain authorized jurists the force of law, intending, doubtless, that the blue ribbon of the profession should never be conferred on any lawyer who had antiquarian notions of constitutional law, or whose instincts did not make him a zealous propagandist of the doctrines of despotism. Ante tempora Augusti publice respondendi jus non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant. Neque responsa utique signata dabant, sed plerumque judicibus ipsi scribebant aut testabantur qui illos consulebant. Primus divus Augustus,

ut major juris auctoritas haberetur, constituit ut ex auctoritate ejus responderent, et ex illo tempore peti hoc pro beneficio coepit, Dig. 1, 2, 47. 'Until Augustus, the public decision of legal questions was not a right conferred by imperial grant, but any one who relied on his knowledge advised the clients who chose to consult him. Nor were juristic opinions always given in a letter closed and sealed, but were generally laid before the judge in the writing or by the attestation of one of the suitors. Augustus, in order to increase their weight, enacted that they should be clothed with his authority, and henceforth this office was sought for as an imperial favour.' Those jurists who had the Jus respondendi were called Juris auctores. Their auctoritas resided, in the first instance, in their responsa, or the written opinions they gave when consulted on a single case; but in the second instance, doubtless, in their writings, which in fact were mainly a compilation of their responsa, a fact which has left its traces in the disjointed and incoherent style which disagreeably characterizes Roman juristic literature. In the course of centuries the accumulation of juristic writings of coordinate authority was a serious embarrassment to the tribunals. To remedy this evil, A.D. 426, Theodosius and Valentinian enacted what is called the law of citations, Cod. Theodosianus, 3, limiting legal authority to the opinions of five jurists, Gaius, Papinian, Ulpian, Paulus, Modestinus, and of any other jurists whom these writers quoted, provided that such quotations should be verified by reference to the original writings of those juris auctores. In case of a divergence of opinion, the authorities were to be counted, and the majority was to prevail. In case of an equal division of authorities, the voice of Papinian was to prevail. A.D. 533, Justinian published his Digest or Pandects, a compilation of extracts from the writings of the jurists, to which he gives legislative authority. Every sentence, accordingly, of these passages is called a lex, and the remainder of their writings is pronounced to be absolutely void of authority. To prevent the recurrence of the evil which his codification was intended to remove, and confident in the lucidity and adequacy of his Digest and Code, Justinian prohibits for the future the composition of any juristic treatise or commentary on the laws. If any one should disregard the prohibition, the books are to be destroyed and the author punished as guilty of forgery (falsitas), Cod. 1, 17, 2, 21.

Besides the sources of law enumerated by Gaius, the Institutes

of Justinian mention Custom or Usage, the source of consuetudinary or customary law (jus non scriptum, consensu receptum, moribus introductum). To this branch of law are referred, with other rules, the invalidity of donations between husband and wife, Dig. 24, 1, 1, the power of making a will for an infant successor who dies before the age of puberty (pupillaris substitutio), Dig. 28, 6, 2, and universal succession in Coemption and Adrogation, 3 § 82. We may suppose that Customary law, like Roman law in general, would fall into two divisions, Civil law and Gentile law, the former embracing what Roman writers sometimes speak of as mores majorum. Before the time of Gaius, however, most, if not all, of Customary law must have been taken up into the edict of the praetor or the writings of the jurists, Cic. De Invent. 2, 22; i. e. unwritten law must have changed its character and have been transformed into written law.

DE IURIS DIVISIONE.

§ 8. Omne autem ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. sed prius videamus de personis.

ON THE BRANCHES OF THE LAW.

§ 8. The whole of the law by which we are governed relates either to persons, or to things, or to procedure; and let us first examine the law of persons.

§ 8. What are the leading divisions of law—what are the main masses into which legislation naturally breaks itself—what are the joints and articulations which separate the whole code into various subordinate codes, like the different limbs and members of an organic whole—what is the import of the Gaian division into jus personarum, jus rerum, jus actionum, or rather, to adhere to the classical phrases, jus ad personas pertinens, jus ad res pertinens, jus ad actiones pertinens?

By jus ad actiones pertinens, to begin with the easier part of the problem, there is no doubt that the inventor of the division intended to designate the law of PROCEDURE as opposed to the law of rights; the adjective code, to use Bentham's phraseology, as opposed to the substantive code. There is as little doubt that in the Institutions of Gaius this design is not executed with precision, and that, instead of the law of procedure, the last portion of his treatise rather contains the law of sanctioning rights, as opposed to the law of primary rights. Or perhaps we should say that the legislative

provisions respecting Procedure have a double aspect: a purely formal aspect, so far as they give regularity and method to the enforcement of sanctioning rights; and a material aspect, so far as certain stages of procedure (e.g. litis contestatio and res judicata) operate like Dispositions or any other Titles to modify the substantive rights of the contending parties. Procedure, then, is treated of in these Institutions partly indeed in its formal character, but still more in its material character, i.e. so far as its incidents can be regarded as belonging to the substantive code.

It is more difficult to determine the principle of the other division, the relation of the law of Persons to the law of Things. They both deal with the rights and duties of persons in the ordinary modern acceptation of the word; why then, we may inquire, are certain rights and duties of persons separated from the rest and dealt with under the distinguishing category of jura personarum? It is not enough to say with Austin that the law of Things is the universal or general portion of the law, the law of Persons a particular and exceptional branch; that it is treated separately on account of no essential or characteristic difference, but merely because it is commodious to treat separately what is special and exceptional from what is general and universal. This answer furnishes no positive character of the law of Persons, but only the negative character of anomaly, i.e. of unlikeness to the larger portion of the law; but it would be difficult to show that the law of Persons is more exceptional, anomalous, eccentric, than the Civil dispositions as opposed to the Natural or Gentile dispositions of the law of Things.

We must look to the details of the law of Persons, and observe whether its dispositions have any common character as contrasted with the dispositions of the law of Things. The law of Persons, in other words, the law of Status, classifies men as slaves and free, as citizens (privileged) and aliens (unprivileged), as paterfamilias (superior) and filiusfamilias (dependent). The law of Things looks at men as playing the parts of contractors or of neighbouring proprietors; in other words, the law of Persons considers men as UNEQUALS, the law of Things considers them as EQUALS: the one may be defined as the law of relations of inequality, the other as the law of relations of equality.

It may induce us to believe that the law of unequal relations and the law of equal relations is a fundamental division of the general code, if we consider how essential are the ideas of equality

and inequality to the fundamental conception of law. If we ventured on a Platonic myth, we might say that Zeus, wishing to confer the greatest possible gift on the human race, took the most opposite and uncombinable things in the universe, Equality and Inequality, and, welding them together indissolubly, called the product by the name of political society or positive law.

The assumption will hardly be controverted, that in the relations of subject to subject, Positive law, like Ethical law, recognizes, as an ideal at least, the identity of the just (lawful) with the equal. Inequality, however, is no less essentially involved in positive law. We have seen that there is no right and no duty by positive law without a legislator and sovereign to whom the person owing the duty is in subjection. On the one side weakness, on the other irresistible power. Positive rights and duties, then, imply both the relation of subject to subject, and the relation of subject to sovereign or wielder of the sanction, in other words, both the relation of equal to equal, and the relation of unequal to unequal. It is the more surprising that Austin should apparently have failed to seize with precision this conception of the law of Persons, as he makes the remark, in which the whole truth seems implicitly contained, that the bulk of the law of Persons composes the Public, Political, or Constitutional code (jus publicum). Political society or government essentially implies subordination. It implies, on the one hand, sovereign power reposing in various legislative bodies, distributed, delegated, and vested in various corporations, magistrates, judges, and other functionaries; on the other hand, private persons or subjects subordinate to the sovereign power and to its delegates and ministers. The different forms of government are so many forms of subordination, so many relations of superior and inferior, that is, so many relations of unequals. Public law, then, is a law of Status, and the law of Persons or law of Status in the private code is the intrusion of a portion of the public code into the private code; or, in barbarous and semi-civilized legislations, the disfigurement of private law by the introduction of relations that properly belong to public law. For instance, the most salient institution of the ancient Roman law of Persons, the power of life and death over wife and child that vested in the father of the household, was the concession to a subject of an attribute that properly belongs to the sovereign or a public functionary. Another institution, slavery, placed one subject over another in

the position of despotic sovereign. The relation of civis to peregrinus, so far as any rights at all were accorded to peregrinus, may be conjectured to have originally been that of patronus to cliens, that is to say, of political superior to political inferior.

Government or positive law has usually commenced in the invasion by the stronger of the (moral) rights of the weaker; but so necessary is inequality to equality, or subordination to coordination, that the (moral) crimes of ancient conquerors are regarded with less aversion by philosophic historians, as being the indispensable antecedents of subsequent civilization. The beginnings, then, of positive law have been universally the less legitimate form of inequality, inequality between subject and subject, leaving its traces in dispositions of the civil code: but the advance of civilization is the gradual elimination of inequality from the law, until little remains but that between magistrate and private person, or sovereign and subject. Modern society has advanced so far on the path of equalization, in the recognition of all men as equal before the law, that the distinctions of status, as they existed in the Roman law of persons, are almost obliterated from the private code. Slavery has vanished; parental and marital power are of the mildest form; civilized countries accord the same rights to cives and peregrini; guardians (tutores) in modern jurisprudence, as in the later period of Roman law, are considered as discharging a public function, and accordingly the relation of guardian and ward may be regarded as a portion of the public code.

Having been led to mention Public or Constitutional law, it may aid to clear our conceptions if we observe that some of its dispositions are necessarily, and by the nature of the case, deficient in the characters of Positive law. It is rigorously true to say that the powers of subordinate political functionaries are a status. They imply rights and duties on the part of superior and inferior, enforced by appeal to the common sovereign. But, when tracing the hierarchy of government, we come to the top of the scale; when we speak of the limitations of the sovereign power, we have passed from the sphere of Positive law. The sovereign is free from the fetters of positive law; he has no legal obligations, for they would imply a superior. Like a private individual who sets an ethical law to himself, the sovereign is not constrained to observe constitutional law by aught that resembles a positive sanction. The existence of a law to bind the sovereign being assumed, the sove-

reign, the author of the law, can abrogate it at pleasure. Like the Aeschylean Jove, παρ' ἑαυτῷ τὸ δίκαιον ἔχων, 'with his own fingers warping law,' ἰδίοις νόμοις Ζεὺς ἀθέτως κρατύνει, 'with self-set law' the sovereign 'sways uncontrolled;' or in the words of another poet, ἡ πόλις ἐβούλεθ', ᾗ νόμων οὐδὲν μέλει, 'such the state's pleasure, whom no law restrains.' Nor has the sovereign any rights like those of a subject by positive law; and this absence of protection by positive sanctions may be expressed by the aphorism—the sovereign's might is his right. The sovereign body, of course, cannot emancipate itself from the law of prudence, nor from the ethical law, nor from the divine law, but these are the only laws from which it is not emancipated. Constitutional law cannot be enforced against the sovereign body by any but moral sanctions. Whereas, then, the law of Persons that belongs to private law is just as much positive law as the law of Things, and political functionaries who exercise a delegated power fall under a positive law of Persons, the absolute sovereign is not invested with legal status. When it approaches the limitations of the sovereign Constitutional law changes its character, it ceases to be positive law, and becomes a law of opinion; or, in other words, public law, so far as it relates to the sovereign, is not properly law, but only a collection of ethical maxims.

In speaking of Constitutional law as a law of status, we must be understood as using the language of theoretical jurisprudence, not of Roman law: the classical jurists use the term status to denote exclusively relations of private persons, denoting by the status of civitas the rights, political or civil, of the private citizen, not the political attributes of the magistrate.

Before we terminate our general remarks on the nature of status, it is necessary to distinguish from the law of Persons a department of law with which, in consequence of a verbal ambiguity, it is sometimes confounded. Blackstone deserves credit for having recognized Public law as a part of the law of Persons; but he also included under the law of Persons that department of primary rights to which belong the right of free locomotion, the right of using the bodily organs, the right to health, the right to reputation, and other rights which perhaps more commonly emerge in the redress meted out for their violation, that is, in the corresponding sanctioning rights, the right of redress for bodily violence, for false imprisonment, for bodily injury, for defamation, and the like.

These, however, are not the special and exceptional rights of certain eminently privileged classes, but the ordinary rights of all the community, at least of all who live under the protection of the law; they belong to filiusfamilias as well as to paterfamilias, to peregrinus and latinus as well as to civis. The rights in question, that is to say, do not belong to the law of unequal rights, or the law of Persons, but to the law of equal rights, or the law of Things.

The anomalous institution of slavery, however, furnishes a ground for controverting this arrangement; for, as by this legalized iniquity of ancient law, the slave, living as he did, not so much under the protection as under the oppression of the law, was denuded of all the rights of humanity, including those of which we speak, we cannot say that these rights belong to servus as well as to liber. The same, however, may be said of contract rights and rights of ownership, for the slave had neither part nor lot in these any more than in the right of a man to the use of his own limbs. In defining, therefore, jura rerum to be the equal rights of all, we must be understood to mean, of all who have any rights. Perhaps, indeed, instead of saying that jura rerum are the rights of men regarded as equal, it would be more exact to say, that while jus personarum regards exclusively the unequal capacities, that is, the unequal rights of persons, jus rerum treats of rights irrespectively both of the equality and the inequality of the persons in whom they are vested, leaving their equal or unequal distribution to be determined by jus personarum.

In order to mark the natural position of these rights in the civil code, I have avoided designating them, with Blackstone, by the name of Personal rights, a term which I am precluded from using by yet another reason. I have employed the terms Personal right and Real right to mark the antithesis of rights against a single debtor and rights against the universe. Now the rights in question are rights that imply a negative obligation incumbent on all the world, that is to say, in our sense of the words they are not Personal, but Real.

As contrasted with Acquired rights (Erworbene rechte, jus quaesitum) they are called Birthrights or PRIMORDIAL rights (Urrechte), names which are open to objection, as they may seem to imply a superior dignity of these rights, or an independence, in contrast with other rights, of positive legislation, characters which

the name is not intended to connote. For purposes of classification this branch of primary rights is of minor importance. Unlike Status, Dominion, Obligation, Primordial rights are not the ground of any primary division of the code. The actions founded on the infraction of Primordial rights partly belong to the civil code of obligation arising from Tort (e. g. actio injuriarum), partly and principally to the criminal code.

DE CONDICIONE HOMINUM.

§ 9. Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.

§ 10. Rursus liberorum hominum alii ingenui sunt, alii libertini.

§ 11. Ingenui sunt, qui liberi nati sunt; libertini, qui ex iusta servitute manumissi sunt.

§ 12. Rursus libertinorum *tria sunt genera: nam aut cives Romani, aut Latini, aut dediticiorum* numero sunt. de quibus singulis dispiciamus; ac prius *de* dediticiis.

ON DIVERSITIES OF CONDITION.

§ 9. The first division of men by the law of persons is into freemen and slaves.

§ 10. Freemen are divided into freeborn and freedmen.

§ 11. The freeborn are free by birth; freedmen by manumission from legal slavery.

§ 12. Freedmen, again, are divided into three classes, citizens of Rome, Latins, and persons on the footing of enemies surrendered at discretion. Let us examine each class in order, and commence with freedmen assimilated to enemies surrendered at discretion.

§ 12. As Gaius has not marked very strongly the divisions of the present book, it may be worth while to consider what are the leading branches of the doctrine of Status. Status falls under three heads,—liberty (libertas), citizenship (civitas), and domestic position (familia).

Under the first head, men are divided into free (liberi) and slaves (servi): the free, again, are either free by birth (ingenui) or by manumission (libertini). We have here, then, three classes to consider: ingenui, libertini, servi.

Under the second head men were originally divided into citizens (cives) and aliens (peregrini). The rights of citizens fall into two branches, political and civil, the former being electoral and legislative power (jus suffragii) and capacity for office (jus honorum), the latter relating to property (commercium) or to marriage (connubium). Aliens were of course devoid of the political portion of these rights (suffragium and honores); they were also devoid of

proprietary and family rights as limited and protected by the civil law (commercium and connubium), though they enjoyed corresponding rights under the jus gentium. At a subsequent period a third class were intercalated between cives and peregrini, namely, latini, devoid of the political portion of the franchise, and enjoying only a portion of the private franchise, commercium without connubium. Here also, then, we have three classes, cives, latini, peregrini.

The powers of the head of a family were nominally three, potestas, manus, mancipium: potestas, however, was either potestas dominica, power over his slaves, or potestas patria, power over his children, which, at the period when Roman law is known to us, were different in kind; so that the rights of paterfamilias were really fourfold. Manus or marital power placed the wife on the footing of filiafamilias, which was the same as that of filiusfamilias. Paterfamilias had a legal power of selling (mancipare) his children into bondage; and mancipium, as denoting a person, designated a filiusfamilias who had been sold by his parent as a bondsman to another paterfamilias. In respect of his purchaser, such a bondsman was assimilated to a slave: in respect of the rest of the world, he was free and a citizen, though probably his political capacities were suspended as long as his bondage (mancipii causa) lasted. As slaves are treated of under the head of libertas, and the status of the wife (manus) was exactly the same as that of the son, we may say, that in respect of domestic dependence or independence (familia), as well as in respect of libertas and civitas, men are divided into three classes,—paterfamilias, filiusfamilias, and mancipium; paterfamilias alone being independent (sui juris), the other two being dependent (alieni juris) in unequal degrees.

These nine classes are not examined by Gaius with equal minuteness. Under the first head he principally examines the libertini: the classes under the second head, cives, latini, peregrini, are only noticed indirectly, i. e. so far as they present a type for the classification of libertini; and the bulk of the first book of the Institutions is devoted to domestic relations.

In modern jurisprudence, Status having disappeared, the law of domestic relations—the relation of husband to wife, parent to child, guardian to ward—constitutes the whole of that of which formerly it was only a part, the law of Persons. It differs from the rest of the civil code in that, while the relations of Property and Obligation

are artificial and accidental, the relations governed by the code of the Family are natural, and essential to the existence of the human race: so much so that the principal relations of the family extend to the rest of the animal world, and the portion of the code relating to them is called by Ulpian preeminently jus Naturale D. 1, 1, 3. Secondly, whereas every feature of Property and Obligation is the creation of political law, Domestic life is only partially governed by political law, which leaves the greater portion of its rights and duties to be ruled by the less tangible dictates of the moral law.

The pure law of the Family, that is, when we exclude all consideration of Property and Obligation relating to property, is of very moderate compass: but with the pure code of the family it is convenient to aggregate what we may call with Savigny, § 57, the applied code of the Family, i. e. such of the laws of Property and Obligation as concern members of the family group—husband and wife, parent and child, guardian and ward. The main divisions then of the substantive code are Family law Pure and Applied; the law of Property; and the law of Obligation. If, in view of its importance, we separate from the law of Property the law of Rerum Universitates, confining the law of Property to the province of Res singulae, we may add to the three we have enumerated a fourth division, the law of Successions.

DE DEDITICIIS VEL LEGE AELIA SENTIA.

§ 13. Lege itaque Aelia Sentia cavetur, ut qui servi a dominis poenae nomine vincti *sint*, quibusve stigmata inscripta *sint*, deve quibus ob noxam quaestio tormentis habita *sit* et in ea noxa fuisse convic*ti* *sint*, quique *ut* ferro aut cum bestiis depugnarent traditi sint, inve ludum custodiamve con*i*ecti fuerint, et postea vel ab e*odem*, domino vel ab alio manumissi, eiusdem condicionis liberi fi*a*nt, cuius condicionis sunt peregrini dediticii.

§ 14. Vocantur autem *peregrini dediticii* hi qui quondam adversus populum Romanum armis susceptis

FREEDMEN ASSIMILATED TO SURRENDERED FOES AND DISPOSITIONS OF THE LEX AELIA SENTIA.

§ 13. The law Aelia Sentia enacts that slaves who have been punished by their proprietors with chains, or have been branded, or have been examined with torture on a criminal charge, and have been convicted, or have been delivered to fight with men or beasts, or have been committed to a gladiatorial school or a public prison, if subsequently manumitted by the same or by another proprietor, shall acquire by manumission the status of enemies surrendered at discretion.

§ 14. Surrendered enemies are people who having taken up arms and fought against the people of

pugnaverunt, deinde, *ut* victi sunt, se dediderunt.

§ 15. Huius ergo turpitudinis servos quocumque modo et cuiuscumque aetatis manumissos, etsi pleno iure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero constitui intellegemus.

§ 16. Si vero in nulla tali turpitudine sit servus, manumissum modo civem Romanum, modo Latinum fieri dicemus.

§ 17. Nam in cuius persona tria haec concurrunt, ut maior sit annorum triginta, et ex iure Quiritium domini, et iusta ac legitima manumissione liberetur, id est vindicta aut censu aut *testamento* is civis Romanus fit: sin vero aliquid eorum deerit, Latinus erit.

Rome and having been defeated have surrendered.

§ 15. Slaves tainted with this degree of criminality, by whatever mode they are manumitted and at whatever age, and notwithstanding the plenary dominion of their proprietor, never become citizens of Rome or Latins, but can only acquire the status of enemies who have surrendered.

§ 16. If unstained by offences of so deep a dye, manumission sometimes makes the slave a citizen of Rome, sometimes a Latin.

§ 17. A slave in whose person these three conditions are united, thirty years of age, quiritary ownership of the manumitter, liberation by a civil and statutory mode of manumission, i. e. by default in a fictitious vindication, by entry on the censor's register, by testamentary disposition, becomes a citizen of Rome: a slave who fails to satisfy one of these conditions becomes only a Latin.

DE MANUMISSIONE VEL CAUSAE PROBATIONE.

§ 18. Quod autem de aetate servi requiritur, lege Aelia Sentia introductum est. nam ea lex minores XXX annorum servos non aliter voluit manumissos cives Romanos fieri, quam si vindicta, aput consilium iusta causa manumissionis adprobata, liberati fuerint.

§ 19. Iusta autem causa manumissionis est veluti si quis filium filiamve, aut fratrem sororemve naturalem, aut alumnum, aut p*aed*agogum, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa, aput consilium manumittat.

ON MANUMISSION AND PROOF OF ADEQUATE GROUNDS OF MANUMISSION.

§ 18. The requisition of a certain age of the slave was introduced by the Lex Aelia Sentia, by the terms of which law, unless he is thirty years old, a slave cannot on manumission become a citizen of Rome, unless the mode of manumission is fictitious vindication, preceded by proof of adequate motive before a body of judicial assessors of the praetor.

§ 19. It is an adequate motive of manumission if, for instance, the slave whose manumission is justified before the council is a natural child or natural brother or sister or foster child of the manumitter's, or a governor of the manumitter's child, or is a male destined to be

employed as an agent in business, or a female destined to become the manumitter's wife.

§ 20. Consilium autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum puberum; in provinciis autem viginti recuperatorum civium Romanorum. idque fit ultimo die conventus: sed Romae certis diebus aput consilium manumittuntur. Maiores vero triginta annorum servi semper manumitti solent, adeo ut vel in transitu manumittantur, veluti cum Praetor aut Proconsule in balneum vel in *th*eatrum eat.

§ 20. The council of assessors is composed at Rome of five senators and five Roman knights above the age of puberty: in the provinces of twenty recuperators, who must be Roman citizens, and who hold their session on the last day of the assize. At Rome the council holds its session on certain days appointed for the purpose. A slave above the age of thirty can be manumitted at any time, and even in the streets, when the praetor or proconsul is on his way to the bath or theatre.

§ 21. Praeterea minor triginta annorum servus manumissione potest civis Romanus fieri, si ab eo domino qui solvendo non erat, *testamento* eum liberum et heredem relictum— [*desunt lin.* 24.]

§ 21. Under the age of thirty a slave becomes by manumission a citizen of Rome, when his owner being insolvent leaves a will, in which he gives him his freedom and institutes him his heir (2 § 154), provided that no other devisee accepts the succession.

§ 22. — *manumissi sunt*, La*ti*ni *I*u*nia*ni *dicunt*ur: Latini ide*o*, *quia* adsimulati *sunt* L*atini*s *colon*iar*iis*; I*un*iani ideo, quia per legem Iuniam libertatem acc*ep*erunt, c*um* olim servi viderentur esse.

§ 22. Slaves manumitted in writing, or in the presence of witnesses, or at a banquet, are called Latini Juniani: Latini because they are assimilated in status to Latin colonists (§ 131), Juniani because they owe their freedom to the lex Junia, before whose enactment they were slaves in the eye of the law.

§ 23. Non *tamen* illis pe*r*mittit lex Iunia nec ipsis testamentum facere, nec ex testamento alieno capere, nec tutores testamento dari.

§ 23. These freedmen, however, are not permitted by the lex Junia either to dispose of their property by will or to take by devise or bequest, or to be appointed testamentary guardians.

§ 24. Quod autem diximus ex testamento eos cap*ere non* posse, i*ta* intelleg*endum est*, *ut nihil* dir*ecto* heredi*t*atis legatorumve nomine *e*os posse capere dicamus; *a*lioquin per fideicommissum capere possunt.

§ 24. Their incapacity to take under a will must only be understood as an incapacity to take directly as successors or legatees, not to take indirectly as beneficiaries of a trust.

§ 25. Hi vero qui dediticiorum numero sunt nullo m*odo ex testamento* capere possunt, non magis quam qui liber peregrinusque *est*.

§ 25. Freedmen classed with surrendered enemies are incapable of taking under a will in any form, as are other free aliens, and are incom-

nec ipsi *testamentum* facere possunt secundum *quod plerisque* placuit.

§ 26. Pessima itaque libertas eorum est qui dediticiorum numero sunt: nec ulla lege aut senatusconsulto aut constitutione principali aditus illis ad civitatem Romanam datur.

§ 27. Quin et in urbe Roma vel intra centesimum urbis Romae miliarium morari prohibentur; et *si contra fecerint*, ipsi bonaque eorum publice venire iubentur ea condicione, ut ne in urbe Roma vel intra centesimum urbis Romae miliarium serviant, *neve umquam manumittantur*; *et* si *manumissi* fuerint, servi populi Romani esse iubentur. et haec ita lege Aelia Sentia comprehensa sunt.

petent to make a will according to the prevalent opinion.

§ 26. It is only the lowest grade of freedom, then, that is enjoyed by freedmen assimilated to surrendered aliens, nor does any statute, senatusconsult, or constitution open to them a way of obtaining Roman citizenship.

§ 27. Further, they are forbidden to reside in Rome or within the hundredth milestone from Rome; and if they disobey the prohibition, their persons and goods are directed to be sold on the condition that they shall be held in servitude beyond the hundredth milestone from Rome, and shall be incapable of subsequent manumission, and, if manumitted, shall be slaves of the people of Rome: and these provisions are dispositions of the lex Aelia Sentia.

§ 17. Manumission was either a public or a private act. When manumission, besides freeing a slave from the dominion of his proprietor, converted him into a citizen of Rome, it was not a matter of merely private interest to be accomplished by the sole volition of the proprietor. Accordingly, the three modes of manumission which conferred the Roman franchise on the manumitted slave, testamento, censu, vindictâ, involved in different forms the intervention of the State.

Wills were originally executed at the Comitia calata, 2 § 101, where the dispositions of the testator, including his donations of freedom, received legislative sanction, being converted into a private law by the ratification of the sovereign assembly. When a new form of will was introduced, 2 § 102, testators retained their power of manumission, although the people here at the utmost were only symbolically represented by the witnesses of a mancipation. Bequests of liberty were either direct or indirect. A direct bequest of liberty (directo data libertas) made the manumitted slave a freedman of the testator (libertus orcinus, Inst. 2, 24, 2): an indirect bequest, that is, a request to the successor to manumit the slave (fideicommissaria libertas), made the slave on manumission a freedman of the successor, 2 § 266.

In manumission by the Census the interests of the State were represented by the censor. Censu manumittebantur olim qui lustrali censu Romae jussu dominorum inter cives Romanos censum profitebantur, Ulpian 1, 8. 'Registry by the censor was an ancient mode of manumission by the quinquennial census at Rome when a slave was ordered by his owner to make his return of property on the register of Roman citizens.' Ex jure civili potest esse contentio, quum quaeritur, is qui domini voluntate census sit, continuone an ubi lustrum conditum liber sit, Cic. De Orat, 1, 40. 'It is a question of civil law, when a slave is registered with his owner's sanction, whether his freedom dates from the actual inscription on the register or from the close of the censorial period.' Ulpian speaks of the census as a thing of the past. Since the Christian era only three had been held, the last under Vespasian, A.D. 74. The only census which ever took place after this was in the reign of the Emperor Decius, A.D. 249.

Soon after manumission by census fell into desuetude, a new form, marking the progress of Christianity, was gradually established, and may be regarded as a substitute for the older form, manumission in ecclesiis. A constitution of Constantine, A.D. 316, recognizing its validity, mentions that it had been long in practice, Cod. 1, 13. It was a proceeding before the bishop in the presence of the congregation, accompanied with a written record, and was practised down to the days of feudalism. Cujacius mentions that the following inscription was to be seen over the door of the ancient cathedral of Orleans: Ex beneficio Sanctae Crucis, per Joannem episcopum et per Albertum Sanctae Crucis casatum, factus est liber Lemtbertus, teste hac sancta ecclesia—'By the grace of the Holy Cross, and by the ministry of Bishop Joannes, Albertus, vassal of the Holy Cross, manumitted Lemtbertus in the presence of this holy Church.'

In manumission by Vindicta the State was represented by the Praetor. The vindicta or festuca was a rod or staff, representing a lance, the symbol of dominion, with which the parties in a real action (vindicatio) touched the subject of litigation as they solemnly pronounced their claim. Accordingly it was used in a suit respecting freedom (liberalis causa), for this, as status is a real right (jus in rem), was a form of real action, and was sometimes prosecuted by way of genuine litigation, sometimes was merely a solemn grant of liberty, that is, a species of alienation by surrender in the

presence of the magistrate (in jure cessio). In a liberalis causa the slave to be manumitted, being the subject of the fictitious litigation, could not himself be a party, but was advocated by a vindex or adsertor libertatis, who in later times was usually represented by the praetor's lictor. The adsertor grasping the slave with one of his hands, and touching him with the vindicta, asserted his freedom, 4 § 16. The proprietor quitting his grasp of the slave (manu mittens) and confessing by silence or express declaration the justice of the claim, the magistrate pronounced the slave to be free. This procedure belonging to the praetor's voluntary, not his contentious, jurisdiction, did not require the praetor to be seated on his elevated platform in the comitium (pro tribunali), but might be transacted by him on the level ground (de plano); and as the mere presence of the praetor constituted a court (jus), he was usually seized upon for the purpose of manumissions as he was preparing to take a drive (gestatio), or to bathe, or to go to the theatre.

§ 18. The lex Aelia Sentia passed in the reign of Augustus, in the same year with the lex Julia de maritandis ordinibus, A.D. 4, and named after the consuls Sextus Aelius Catus and Caius Sentius Saturninus, was intended to throw obstacles in the way of acquiring the Roman franchise. One of its enactments provided that a slave under the age of thirty could not be made a citizen unless manumitted by Vindicta, after proof of adequate motive before a certain judicial board. We may inquire what would be the effect of manumission if the causae probatio were omitted. Inscription on the censor's register was probably entirely null and void, as this ceremony was either a mode of making a Roman citizen or it was nothing. Testamentary manumission, as we learn from Ulpian, left the man legally a slave, but gave him actual liberty (possessio libertatis, in libertate esse, as opposed to libertas), a condition recognized and protected by the praetor. Manumission by Vindicta probably gave the slave freedom without the franchise, i. e. made him a peregrinus; at least it is not obvious why he should have been worse off than testamento manumissus, and the following passage of Ulpian implies that their condition was not exactly the same: 'Eadem lege cautum est ut minor triginta annorum servus vindicta manumissus civis Romanus non fiat, nisi apud consilium causa probata fuerit, id est sine consilio manumissum caesaris' (sic. For this word some conjecture: Lex Aelia Sentia. Perhaps we should read something to the following effect: peregrinum facit,

nam nec civitatem adipisci nec) 'servum manere putat; testamento vero manumissum perinde haberi jubet, atque si domini voluntate in libertate esset, ideoque latinus fit,' 1, 12. The subsequent lex Junia Norbana apparently provided that, in the absence of causae probatio, the minor triginta annis manumissus, whether testamento or vindicta, should belong to the new class which it introduced, namely, the Latini. Hence, by an intelligible anachronism, Gaius, § 29, § 31, speaks of Latini made by the lex Aelia Sentia.

§ 19. Alumnus denotes a slave child reared by the manumitter, as appears from the following passage: Alumnos magis mulieribus conveniens est manumittere, sed et in viris receptum est, satisque est permitti eum manumitti in quo nutriendo propensiorem animum fecerint, Dig. 40, 2, 14. 'Foster children are more naturally manumitted by women than by men, though not exclusively; and it suffices to allow the manumission of a child who has won his proprietor's affection in the course of his education.'

§ 20. The Equites Romani, who at Rome composed a moiety of the judicial assessors, are opposed to Equites equo publico. Eques Romanus was such merely by his census: Eques equo publico, in the latter days of Rome, was a youth nominated by the emperor to the turmae equitum; not, however, intended for actual service with the legions, but merely marked out as an expectant of future employment in higher public functions, military or civil. The title of Princeps juventutis, often conferred by the emperors on their successors designate, denoted the leader of the Equites equo publico. In the time of Augustus the list of judices (album judicum) consisted of three panels (decuriae, Senatores), Equites Romani, and Equites equo publico. Augustus added a fourth, the Ducenarii, those whose census amounted to 200,000 sesterces, who judged minor cases; and subsequently Caligula added a fifth.

Recuperators are judges not taken from the panel (album judicum).

§ 21. Ulpian adds, 1, 14, that a slave who otherwise would only have become dediticius, or a freedman of the lowest class, if he is instituted the heres necessarius of an insolvent, becomes civis Romanus.

§ 22. When manumission was a purely private act, it could not confer the Roman franchise; it could only make a dediticius or a latinus.

The codex Alaricianus or Breviarium Alaricianum, a code pro-

mulgated A.D. 506 by Alaric II, king of the Visigoths of Spain and Gaul, contained, besides extracts from the codex Theodosianus (promulgated A.D. 436), a selection from the Sententiae of Paulus and an epitome of these institutes of Gaius. From this epitome it appears that in the paragraphs now obliterated Gaius proceeded to explain the modes of private manumission by which a slave became Latinus Junianus, and instanced writing (per epistolam), attestation of witnesses (inter amicos), invitation of the slave to sit with other guests at the table of his master (convivii adhibitione).

The lex Junia Norbana, probably passed in the reign of Tiberius, A.D. 19, fifteen years after the lex Aelia Sentia, in the consulate of Marcus Junius Silanus and Lucius Norbanus Balbus, defined and modified the status conferred by such acts of private manumission, converting Praetoris tuitione liber into ipso jure liber, or possessio libertatis into genuine libertas; with, however, sundry grievous stints and deductions. Under this statute the freedman was nominally assimilated to Latinus coloniarius, the citizen of a Roman colony in Latium; that is, had a moiety of the private rights composing civitas Romana or jus Quiritium, possessing commercium without connubium. As incapable of connubium or civil marriage, the Latinus was incapable of patria potestas over his children and of agnatio or civil relationship. Though incapable of civil marriage he was of course capable of gentile marriage (matrimonium, uxorem liberorum quaerendorum causa ducere) and of natural relationship (cognatio), just as an alien (peregrinus), though, by want of commercium, incapable of dominion ex jure Quiritium, was capable of bonitary ownership (in bonis habere) under the jus gentium.

In virtue of commercium, the Latinus Junianus was capable of Quiritary ownership, of civil acquisition and alienation (usucapio, mancipatio, in jure cessio), contract (obligatio), and action (condictio, vindicatio), like a Roman citizen; but in respect of testamentary succession his rights were very limited. He was said to have testamentary capacity (testamentifactio), Ulpian, 20, 9; but this only meant that he could perform the part of witness, or familiae emptor, or libripens (2 § 104), i. e. could assist another person to make a valid will; not that he could take under a will either as heir or as legatee, or could dispose of his own property by will, Ulpian, 20, 14. At his death all his property belonged to his patron, as if it were the peculium of a slave, 3 § 56. In fact, as Justinian says: Licet ut liberi vitam suam peragebant, attamen

ipso ultimo spiritu simul animam atque libertatem amittebant, Inst. 3, 7, 4. 'Though free in their lifetime, the same moment that deprived them of life reduced them to the condition of slaves.'

Although in the person of libertus himself, Latinitas was almost a mockery, yet it was not so for his posterity; these disabilities only attached to the original freedman, not to his issue. The son of the dediticius or Latinus Junianus, though reduced to absolute penury by the confiscation of the parental property to the patron, began, and continued, the world with the ordinary capacities, respectively, of peregrinus and Latinus coloniarius, and was under no legal obligations to the patron of his father.

Long before the time of Gaius, Latinitas or Latium had only a juristic, not an ethnographic signification. Soon after the social war all Italy received the civitas Romana. Originally Gallia Cispadana (Southern Lombardy) had civitas Romana, while Gallia Transpadana (Northern Lombardy) had only Latinitas, but Gallia Transpadana afterwards obtained civitas. Latinitas was a definite juristic conception, and Latin status was conferred as a boon on many provincial towns and districts that had no connection with Latium or its races. Vitellius is carped at by Tacitus for his lavish grants of Latinity (Latium vulgo dilargiri, Hist. 3, 55). Hadrian made many similar grants (Latium multis civitatibus dedit, Spartian, Had. 21), and Vespasian conferred Latin rights on the whole of Spain, Pliny, Hist. Nat. 3, 4.

QUIBUS MODIS LATINI AD CIVITATEM ROMANAM *PERVENIANT*.

§ 28. Latini multis modis ad civitatem Romanam perveniunt.

§ 29. *Statim* enim eadem lege Aelia Sentia cautum est, ut minores triginta annorum manumissi *et* Latini facti, si uxores duxerint vel cives Romanas, vel Latinas coloniarias, *vel eius*dem condicionis cuius et ipsi essent, idque testati fuerint adhibitis non minus quam septem testibus civibus Romanis puberibus, et filium procreaverint, *et* is filius anniculus *fuerit*, per*mitt*atur eis, *si velint*, per eam legem adire Praetorem vel in provinciis Praesidem

MODES BY WHICH LATIN FREEDMEN BECOME ROMAN CITIZENS.

§ 28. Latins have many avenues to the Roman franchise.

§ 29. For instance, the same lex Aelia Sentia enacts that when a slave below the age of thirty becomes by manumission a Latin, if he take to himself as wife a citizen of Rome, or a Latin colonist, or a freedwoman of his own condition, and thereof procure attestation by not less than seven witnesses, citizens of Rome above the age of puberty, on begetting a son who attains the age of a year, he shall be permitted if he choose to avail himself of his

provinciae, et adprobare se *ex* lege A*elia* S*entia* uxorem duxisse et ex ea filium anniculum habere; et si is aput quem causa probata est id ita esse pronuntiaverit, tunc et ipse Latinus et uxor eius, si et ipsa eiusdem *condicionis sit, et ipsorum filius, si et ipse eiusdem* condicionis sit, cives Romani esse iubentur.

privilege under that statute to apply to the praetor, or, if he reside in a province, to the president of the province, and to prove that he has conformed to the requirement of the lex Aelia Sentia by marrying a wife, and begetting by her a son who has completed the first year of his age: and thereupon if the magistrate to whom the proof is submitted pronounce the truth of the declaration, that Latin and his wife, if she is of the same condition, and their son, if he is of the same condition, are declared by the statute to be Roman citizens.

§ 30. Ideo autem in ipso*rum f*ilio adiecimus 'si et ipse e*ius*dem condicionis sit,' q*uia* si uxor Latini civis Romana *est*, qui ex ea nascitur ex novo senatusconsulto quod auctore divo Hadriano factum est, civis Romanus nascitur.

§ 30. The reason why I added, when I mentioned the son, if of the same condition, was this, that if the wife of the Latin is a citizen of Rome, the son, in virtue of the recent senatusconsult made on the motion of the late Emperor Hadrian, is a citizen of Rome from the date of his birth.

§ 31. Hoc tamen ius adipiscendae civitatis Romanae etiamsi so*l*i minores *tr*iginta annorum manumissi et Latini facti ex lege Aelia Sentia habuerunt, tamen postea senatusconsulto quod Pegaso et Pusione Consulibus factum est, et*iam* maioribus triginta annorum manumissis Latinis factis concessum est.

§ 31. This capacity of acquiring Roman citizenship, though by the lex Aelia Sentia exclusively granted to freedmen who only became Latins in consequence of being under thirty years of age at the time of their manumission, by a subsequent senatusconsult, made in the consulship of Pegasus and Pusio, was extended to all freedmen who acquire the status of Latins, even though thirty years old when manumitted.

§ 32. Ceterum etiamsi an*te de*cesserit Latinus, *quam* anni*culi f*i*l*ii causam probarit, potest mat*er* eius causam probare, et sic et ipsa fie*t* civis Rom*ana* [*desunt* 39. *lin.*]

§ 32. If the Latin die before proving the title of his son, on his son's attaining the age of a year the mother may prove the title, and thereupon both she and her son become citizens of Rome.

§§ 33, 34, 35. *si quis alicuius et* in bonis et ex iure Quiritium sit, manumissus, ab eodem scilicet, et Latinus fieri p*otest et* ius Quiritium consequi.

§ 33, 34, 35. A slave in whom his owner has both bonitary and quiritary property, if twice manumitted by his owner, may acquire by the first manumission the Latin status, and by the second the Roman franchise.

§ 29. The decision (sententia) of the judex in a judicium ordinarium was either condemnatio or absolutio of the defendant. In real actions this was apparently preceded by pronuntiatio, a declaration of the rights of the parties. This appears from the following, among other passages: Sed et si fundum vindicem meum esse, tuque confessus sis, perinde teneberis atque si dominii mei fundum esse pronunciatum esset, Dig. 42, 2, 6, 2. Si quum de hereditate inter me et te controversia esset, juravero hereditatem meam esse, id consequi debeo quod haberem si secundum me de hereditate pronuntiatum esset, Dig. 12, 2, 10, 3. When the pronuntiatio was for the plaintiff, if the defendant obeyed the arbitrium or provisional order of the judex by making restitution, there was no subsequent condemnatio. In the form of real action, called a praejudicium, that is, a simple issue of fact, the pronunciatio formed the whole result of the trial, and was not followed by sententia. Similarly, when a Latinus laid his claim of Roman franchise before the praetor under this enactment of the lex Aelia Sentia, the result of the extraordinaria cognitio of the praetor, as appears by this paragraph, was merely a pronuntiatio without any subsequent decretum.

§ 35. Besides the method provided by the lex Aelia Sentia, Latinus or Latina might attain the Roman franchise under the following conditions:—

1. By erroris causae probatio, i.e. if, intending to comply with the statute, Latinus marry Peregrina, believing her to be Latina, § 70; or Latina marry Peregrinus, believing him to be Latinus, § 69; or if Civis, believing himself to be Latinus, marry Latina, § 71; or if Civis marry Latina, believing her to be Civis Romana, § 67; on proof of this mistake, the Latinus or Latina and their offspring acquire the franchise.

2. By magistracy in a Latin colony Latinus becomes Civis Romanus, § 95.

3. By remanumission (iteratio), i. e. after acquiring Latinity by one of the private modes of manumission, a subsequent manumission by one of the public modes, vindicta, censu, or testamento, converted Latinus into Civis, § 35, and Ulpian, 3, 4.

4. By six years' service in the Roman guards (si inter vigiles Romae sex annos militaverit, Ulp. 3, 5). A decree of the senate made three years' service a sufficient title. Compare the provision of 13 Geo. II, c. 3, whereby every foreign seaman who in time of

war serves two years on board an English ship, and all foreign protestants serving two years in a military capacity in the American colonies, are naturalized.

5. By building a house in Rome (aedificio, Ulp. 3, 1).

6. By building a ship of 10,000 modii and importing corn to Rome for six years, Ulp. 3, 6. Compare the English law by which all foreign protestants employed three years in the whale fishery are naturalized, except as to capacity for public office.

7. By building a mill and bakehouse for the supply of Rome (pistrino, Ulp. 3, 1).

8. By bearing three children, Ulp. 3, 1.

9. By imperial grant (beneficio principali, Ulp. 3, 2).

Civitas Romana and Jus Quiritium are synonymous, but the former term was always used when the franchise was conferred on a Peregrinus, the latter generally when it was conferred on Latinus Junianus: e.g. Quare rogo, des ei civitatem, est enim peregrinae conditionis, manumissus a peregrina. . . . Idem rogo, des jus Quiritium libertis Antoniae Maximillae . . . quod a te, petente patrona, peto, Pliny to Trajan, 10, 4. Ago gratias, domine, quod et jus Quiritium libertis necessariae mihi feminae et civitatem Romanam Harpocrati, iatraliptae meo, sine mora indulsisti, ibid. 10, 5. Civitas Romana, however, was sometimes used in speaking of the enfranchisement of Latinus, as we see from Gaius 1, § 28.

QUI, QUIBUS EX CAUSIS, MANUMITTERE NON POSSINT.

§ 36. *Non tamen cuicumque volenti manumittere licet.*

§ 36. Not every owner who is so disposed is capable of manumission.

§ 37. *nam is qui* in fraudem creditorum vel in fraudem patroni manumitt*it*, nihil agit, quia lex Aelia Sentia impedit libertatem.

§ 37. An owner who would defraud his creditors or his own patron by an intended manumission, attempts in vain to manumit, because the lex Aelia Sentia defeats the manumission.

§ 38. Item eadem lege minori xx annorum domino non aliter manumittere permittitur, quam si vindicta aput consilium iusta causa manumissionis adprobata fuerit.

§ 38. Again, by a disposition of the same statute, before attaining twenty years of age, the only process by which an owner can manumit, is fictitious vindication preceded by proof of adequate motive before the council of assessors.

§ 39. Iustae autem causae manumissionis sunt: veluti si quis pa-

§ 39. It is an adequate motive of manumission, if the father, for in-

trem aut matrem aut paedagogum aut conlactaneum manumittat. sed et illae causae, quas superius in servo minore XXX annorum exposuimus, ad hunc quoque casum de quo loquimur adferri possunt. item ex diverso hae causae, quas in minore XX annorum domino rettulimus, porrigi possunt et ad servum minorem XXX annorum.

stance, or mother, or governor, or foster-brother of the manumitter, is the slave to be manumitted. In addition to these, the motives recently specified respecting the slave under thirty years of age, may be alleged when the manumitting owner is under twenty; and, reciprocally, the motives valid when the manumitting owner is under twenty, are admissible when the manumitted slave is under thirty.

§ 40. Cum ergo certus modus manumittendi minoribus XX annorum dominis per legem Aeliam Sentiam constitutus sit, evenit, ut qui XIIII annos aetatis expleverit, licet testamentum facere possit, et in eo heredem sibi instituere legataque relinquere possit, tamen, si adhuc minor sit annorum XX, libertatem servo dare non potest.

§ 40. As, then, the lex Aelia Sentia prescribes a certain mode of manumission for owners under the age of twenty, it follows that, though after completing his fourteenth year, a person is competent to make a will, and therein to institute an heir and leave bequests; yet, until he has attained the age of twenty, he cannot therein enfranchise a slave.

§ 41. Et quamvis Latinum facere velit minor XX annorum dominus, tamen nihilominus debet aput consilium causam probare, et ita postea inter amicos manumittere.

§ 41. And even to confer the Latin status, if he is under the age of twenty, the owner must satisfy the council of the adequacy of his motive before he manumits the slave in the presence of witnesses.

§ 41. Justinian permitted minors to enfranchise by will as soon as they could make a valid will, i. e. at the age of 14, Novella, 119, 2. He mentions that the lowest class of freedmen (dediticia libertas) had long been obsolete, and formally abolished the second class (latina libertas), converting most of the modes of making Latinus into modes of making Civis Romanus, and declaring the rest inoperative, Cod. 7, 6.

DE LEGE FURIA CANINIA.

§ 42. Praeterea lege Furia Caninia certus modus constitutus est in servis testamento manumittendis.

§ 42. Moreover, by the lex Furia Caninia a certain limit is fixed to the number of slaves who can receive testamentary manumission.

§ 43. Nam ei qui plures quam duos neque plures quam decem servos habebit, usque ad partem dimidiam eius numeri manumittere permit-

§ 43. An owner who has more than two slaves and not more than ten is allowed to manumit as many as half that number; he who has

titur. ei vero qui plures quam X neque plures quam XXX servos habebit, usque ad tertiam partem eius numeri manumittere permittitur. at ei qui plures quam XXX, neque plures quam centum habebit, usque ad partem quartam *manumittere permittitur, nec latior licentia* datur. novissime ei qui plures quam C habebit, nec plures quam D, *amplius non* permittitur, quam ut quintam partem, neque plures *manumittat*. sed praescribit lex, ne cui plures manumittere liceat quam C. *igitur* si quis unum servum omnino aut duos habet, *de eo hac lege nihil cautum est;* et ideo liberam habet potestatem manumittendi.

§ 44. Ac nec ad eos *quidem* omnino haec lex pertinet, qui sine testamento manumittunt. itaque licet iis, qui vindicta aut censu aut inter amicos manumittunt, totam familiam suam liberare, scilicet si alia causa non inpediat libertatem.

§ 45. Sed quod de numero servorum testamento manumittendorum diximus, ita intell*egemus, ut ex eo* numero, ex quo dimidia aut tertia aut quarta aut quinta pars liberari *potest, utique tot manumittere* liceat, quot ex antecedenti numero licuit. et hoc ipsa *lege pro*visum est. erat enim sane absurdum, ut X servorum domino quinque liberare liceret, quia usque ad dimidiam partem *ex eo* numero manumittere ei conceditur, *ulterius autem* XII servos habenti non plures liceret manumittere quam IIII. at eis qui plures quam X neque [*desunt lin.* 24].

§ 46. Nam et si testamento scriptis in orbem servis libertas data sit, quia nullus ordo manumissionis invenitur, nulli liberi erunt; quia lex Furia Caninia quae in fraudem eius facta sint rescindit. sunt etiam

more than ten and not more than thirty is allowed to manumit a third of that number; he who has more than thirty and not more than a hundred is allowed to manumit a fourth; lastly, he who has more than a hundred and not more than five hundred is allowed to manumit a fifth: and, however many a man possesses, he is never allowed to manumit more than this number, for the law prescribes that no one shall manumit more than a hundred. On the other hand, if a man has only one or only two, the law is silent, and the owner has unrestricted power of manumission.

§ 44. Nor does the statute apply to any but testamentary manumission, so that by means of fictitious vindication or inscription on the censor's register, or by attestation of friends, a proprietor of slaves may manumit his whole household, provided that there is no other let or hindrance to impede their manumission.

§ 45. But the limitation of the number of slaves that a testator is allowed to manumit is subject to the following proviso: that out of each of the numbers from which a half, a third, a fourth, a fifth, may respectively be enfranchised, as many may always be enfranchised as out of the preceding number, a proviso expressed in the statute; indeed, it would have been irrational if the owner of ten slaves had been entitled to enfranchise five, and the owner of twelve could only manumit four . . . .

§ 46. If a testator manumits in excess of the permitted number, and arranges their names in a circle, as no order of manumission can be discovered, none of them can obtain their freedom, as both the lex Furia

specialia senatusconsulta, quibus rescissa sunt ea quae in fraudem eius legis excogitata sunt.

Caninia itself and certain subsequent decrees of the senate declare null and void all dispositions contrived for the purpose of eluding the statute.

§ 47. In summa sciendum est, *cum* lege Aelia Sentia cautum sit, ut *qui* creditorum fraudandorum causa manumissi sint liberi non fiant, etiam hoc ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani); cetera vero iura eius legis ad peregrinos non pertinere.

§ 47. Finally, it is to be noted that the provision in the lex Aelia Sentia making manumissions in fraud of creditors inoperative, was extended to aliens by a decree of the senate passed on the proposition of the Emperor Hadrian; whereas the remaining dispositions of that statute are inapplicable to aliens.

§ 47. The lex Furia Caninia, passed A.D. 8, four years after the lex Aelia Sentia, in the consulate of Furius Camillus and Caius Caninius Gallus, was abrogated by Justinian.

DE HIS QUI SUI VEL ALIENI IURIS SINT.

§ 48. Sequitur de iure personarum alia divisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae.

§ 48. Another division in the law of Persons classifies men as either dependent or independent.

§ 49. Sed rursus earum personarum, quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt.

§ 49. Those who are dependent or subject to a superior, are either in his power, in his hand, or in his mancipation.

§ 50. Videamus nunc de iis quae alieno iuri subiect*ae* sint: si cognoverimus quae istae personae *s*int, simul intellegemus quae sui iuris sint.

§ 50. Let us first explain what persons are dependent on a superior, and then we shall know what persons are independent.

§ 51. Ac prius dispiciamus de iis qui in aliena potestate sunt.

§ 51. Of persons subject to a superior, let us first examine who are in his power.

§ 52. In potestate itaque sunt servi dominorum. quae quidem potestas iuris gentium est: nam aput omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse. et quo*d*cumque per servum adquiritur, id domino adquiritur.

§ 52. Slaves are in the power of their proprietors, a power recognized by Gentile law, for all nations present the spectacle of masters invested with power of life and death over slaves; and by the Roman law the owner is entitled to everything acquired by servile labour.

§ 53. Sed hoc tempore neque civibus Romanis, nec ullis aliis hominibus qui sub imperio populi Romani

§ 53. But in the present day neither citizens of Rome, nor any other persons under the empire of the

sunt, licet supra modum et sine causa in servos suos saevire. Nam ex constitutione *sacratissimi* Imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit. Sed et maior quoque asperitas dominorum per eiusdem Principis constitutionem coercetur. Nam consultus a quibusdam Praesidibus provinciarum de his servis, qui ad fana deorum vel ad statuas Principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere. Et utrumque recte fit; male enim nostro iure uti non debemus: qua ratione et prodigis interdicitur bonorum suorum administratio.

people of Rome, are permitted to indulge in excessive or causeless harshness towards their slaves. By a constitution of the Emperor Pius Antoninus, a man who kills a slave of whom he is owner, is as liable to punishment as a man who kills a slave of whom he is not owner: and inordinate cruelty on the part of owners is checked by another constitution whereby the same emperor, in answer to enquiries from presidents of provinces concerning slaves who take refuge at temples of the gods, or statues of the emperor, commanded that on proof of intolerable cruelty a proprietor should be compelled to sell his slaves: and both ordinances are just, for it is proper that the abuse of a lawful right should be restrained, a principle recognized in the interdiction of prodigals from the administration of their fortune.

§ 54. Ceterum cum aput cives Romanos duplex sit dominium, (nam vel in bonis vel ex iure Quiritium vel ex utroque iure cuiusque servus esse intellegitur), ita demum servum in potestate domini esse dicemus, si in bonis eius sit, etiamsi simul ex iure Quiritium eiusdem non sit. nam qui nudum ius Quiritium in servo habet, is potestatem habere non intellegitur.

§ 54. Citizens of Rome having two kinds of dominion, bonitary and quiritary, or a union of bonitary and quiritary dominion, a slave is in the power of an owner who has bonitary dominion over him, even unaccompanied with quiritary dominion; if an owner has only naked quiritary dominion he is not deemed to have the slave in his power.

The condition of the slave was at its worst in the golden period of Roman history. As soon as Rome found her power irresistible she proceeded to conquer the world, and each stage of conquest was the reduction of a vast portion of mankind to slavery. 30,000 Tarentines were sent as slaves to Rome by Fabius Cunctator, the captor of Tarentum; 150,000 Epirots by Paulus Aemilius, the subjugator of Epirus. Julius Caesar retrieved his shattered fortunes by enormous operations in the slave market during his campaigns in Gaul. Thus, unfortunately for the slave, the slave market was continually glutted and slave life was cheap. The condition of the slave gradually but slowly improved under the emperors. A lex

Petronia of uncertain date required a slave-owner to obtain the permission of a magistrate before exposing a slave to be torn to pieces by wild beasts, and only allowed such permission to be granted for some offence committed by the slave, Dig. 48, 8, 11, 2. Claudius prohibited killing slaves who fell sick, and enacted that the exposure of a slave to perish in his sickness should operate as a manumission, conferring Latinitas, Sueton. Claud. 25, Cod. 7. 6. 3. Hadrian deprived proprietors of the power of putting slaves to death without a judicial sentence, Spartian, Had. 18. Antoninus Pius declared a proprietor who killed a slave to be guilty of murder, and subject to the penalty of the lex Cornelia de sicariis. We read in Justinian's Digest: Qui hominem occiderit punitur non habita differentia cujus conditionis hominem interemit, Dig. 48, 8, 12. 'Homicide is punished without regard to the status of the person killed.' The punishment was generally capital. Legis Corneliae de sicariis et veneficis poena insulae deportatio est et omnium bonorum ademptio. Sed solent hodie capite puniri nisi honestiore loco positi fuerint quam ut poenam legis sustineant: humiliores enim solent vel bestiis subici, altiores vero deportantur in insulam, Dig. 48, 8, 3, 5. 'The law of Cornelius Sylla touching assassins and poisoners, punishes with transportation to an island and forfeiture of all property. But at present the punishment is usually capital, unless the criminal is of exalted station; humbler criminals are thrown to wild beasts, only criminals of higher rank are transported.' Hadrian prohibited the castration of a slave, consenting or not consenting, under penalty of death, Dig. 48, 8, 4, 2. Antoninus Pius also protected slaves against cruelty and personal violation, Dig. 1, 6, 2. The Digest, 1, 6, 1, quoting Gaius, 1 § 53, after sine causa, interpolates, legibus cognita, thus placing slaves under the protection of the law, and almost recognizing in slaves some of the primordial rights of humanity, except that, as already observed, obligation does not necessarily imply a correlative right. Roman law to the end, unlike other legislations which have recognized forms of slavery, refused to admit any rights in the slave. Florentinus, however, not long after the time of Gaius, admitted that slavery was a violation of the law of nature. Servitus est constitutio juris gentium qua quis dominio alieno contra naturam subicitur, Dig. 1, 5, 4. 'Slavery is an institution of Gentile law, making one man the property of another, in contravention of Natural law.' Ulpian says the same: Quod attinet ad jus civile, servi pro nullis habentur,

non tamen et jure naturali; quia quod ad jus naturale attinet, omnes homines aequales sunt, Dig. 50, 17, 32. 'Before the Civil law a slave is nothing, but not before the Natural law; for in the eye of Natural law all men are equal.' The belief in a Natural law, more venerable than any Civil law, was very prevalent in the ancient world, and one of the principal contributions of Philosophy to civilization.

The absolute privation of all rights was sometimes expressed by saying that a slave has no persona, caput, or status: e.g. Servos quasi nec personam habentes, Nov. Theod. 17. 'Slaves being regarded as impersonal men.' Servus manumissus capite non minuitur quia nullum caput habet, Inst. 1, 16, 4. 'A slave by manumission loses no rights, having none to lose.' Cum servus manumittitur, quia servile caput nullum jus habet, ideo nec minui potest, eo die enim incipit statum habere, Dig. 4, 5, 4. 'A slave who is manumitted, having no rights, cannot lose any, for all his rights date from the day of his manumission.' The word 'persona,' however, is sometimes applied to slaves: e.g. in personam servilem nulla cadit obligatio, Dig. 50, 17, 22. 'A slave can owe no obligation;' see also Gaius, 1 § 17. So is caput in one of the above quoted passages.

DE PATRIA POTESTATE.

§ 55. Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. quod ius proprium civium Romanorum est. fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus. idque divus Hadrianus edicto quod proposuit de his, qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. nec me praeterit Galatarum gentem credere, in potestatem parentum liberos esse.

§ 55. Again, a man has power over his own children begotten in civil wedlock, a right peculiar to citizens of Rome, for there is scarcely any other nation where fathers are invested with such power over their children as at Rome; and this the late Emperor Hadrian declared in the edict he published respecting certain petitioners for a grant of the Roman franchise to themselves and their children; though I am aware that among the Galatians parents are invested with power over their children.

§ 55. The most peculiar portion of the Roman law of status is that which refers to patria potestas, or the relation of paterfamilias to filiusfamilias. Patria potestas was founded on consuetudinary law (quum jus potestatis moribus sit receptum, Dig. 1, 6, 8), and

may be considered under two heads, (1) as regarding the person of the son, (2) as regarding proprietary rights acquirable by the son.

1. Over the person of the child the father had originally a power of life and death. Patribus jus vitae in liberos necisque potestas olim erat permissa, Cod. 8, 47, 10. So the lex Pompeia de parricidiis, enumerating the persons who could be guilty of parricide, or the murder of a blood relation, omits the father, Dig. 48, 9. Compare also the formula of Adrogatio, § 98, commentary. But in later times this power was withdrawn. Hadrian condemned to deportation a father who in the hunting-field killed his son who had committed adultery with his stepmother, Dig. 48, 9, 5. Constantine, A.D. 319, included killing by a father under the crime of parricide, Cod. 9, 17. Fathers retained the power of moderate chastisement, but severe punishment could only be inflicted by the magistrate, Cod. 8, 47, 3. Si atrocitas facti jus domesticae emendationis excedat, placet enormis delicti reos dedi judicium notioni, Cod. 9, 15. Trajan compelled a father to emancipate a son whom he treated with inhumanity, Dig. 37, 12, 5. It was originally at the option of the parent whether he would rear an infant or expose it to perish, but in later times exposition was unlawful. Unusquisque sobolem suam nutriat: quod si exponendam putaverit, animadversioni quae constituta est subjacebit, Valentinian, Valens, and Gratian, A.D. 374, Cod. 8, 52, 2. 'Every parent must rear his offspring, and exposition will be punished according to law.'

Originally also parents had the power of selling (mancipandi) their children into bondage, thus producing a capitis minutio, or degradation of status. In fact, the patriarchs of the Roman race were slave-dealers who, like some savage tribes in Africa and elsewhere, trafficked in the bodies of their own children. We must note, however, that the bondage into which a Roman father sold his children was, at least at the time at which this institution is known to us, a limited degree of subjection: the mancipation could only be made to another Roman citizen, and the bondsman continued to be liber and civis. But this power also was withdrawn in more civilized times. A law of Diocletian and Maximian declares the sale, donation, pledging of children to be unlawful, Cod. 4, 43, 1. A rescript of one of the Antonines commences in the following terms: Rem illicitam et inhonestam admisisse te confiteris, quia proponis filios ingenuos a te venundatos, Cod. 7, 16, 1: 'You are guilty, by your own admission, of an unlawful and disgraceful act,

as you state that you sold your freeborn children.' Justinian increased the penalties of the law against creditors who took possession of the freeborn child of a debtor as a security for a debt. He enacted that the creditor should forfeit the debt, should pay an equal sum to the child or parent, and in addition should undergo corporal punishment, Novella, 134, 7. In the time of Gaius, the only genuine sale of a child into bondage was in the case of noxal surrender, i.e. when a father sued for the trespass of a child, in lieu of damages, surrendered his delinquent son or daughter as a bondsman (mancipium) to the plaintiff, § 140. The sale of the child in adoption and emancipation was merely fictitious; even noxal surrender was practically obsolete in the time of Justinian, by whom it was formally abolished, Inst. 4, 8, 7. Constantine, however, in cases of extreme poverty permitted parents to sell their children immediately after birth (sanguinolentos), and this constitution was retained in the code of Justinian, Cod. 4, 43, 2.

2. In respect of property, filiusfamilias was capable of obligation but not of right; he could be debtor but not creditor; in any transaction where an independent person (sui juris) would have been creditor, filiusfamilias was merely a conduit-pipe through which a right vested in his father as creditor or proprietor. Even in domestic relations filiusfamilias could only figure as inferior, not as superior; he owed obedience, but could not exercise command (jus, in the special sense which it has in the phrases, sui juris, alieni juris); he could only be an instrument by which his father acquired a right of command. Thus, filiusfamilias had commercium, and could take by mancipatio, but the property he thus took vested in his father; he could make a valid contract, but the contractual right vested in his father; he had testamentifactio, that is, he could be witness, libripens, familiae emptor, but he could not make a will, for he had no property to leave; and if he took under a will as legatee or heir, the legacy or succession vested in his father. He had the other element of civitas, connubium; that is, he could contract a civil marriage and beget civil children; but the patria potestas over these children vested not in the father but in the grandfather, and if the marriage was accompanied with power of hand (manus), marital power over the wife, this vested not in the husband but in the husband's father. Any property which the son was allowed by his father to manage was called his peculium, i.e. was held on the same terms as property which a slave administered

by permission of his proprietor. In respect of debts which he incurred, the son did not act as conduit-pipe, but (except for a loan of money, which the Sc. Macedonianum made irrecoverable,) was liable in his own person. Filiusfamilias ex omnibus causis tanquam paterfamilias obligatur, et ob id agi cum eo tanquam cum patrefamilias potest, Dig. 44, 7, 39. 'A son under power incurs obligation by the same titles, and may be sued on the same grounds of action as an independent person.' The same rule applied to the son as to the slave: Melior conditio nostra per servos fieri potest, deterior fieri non potest, Dig. 50, 17, 133. 'The melioration of his proprietor's condition is in the power of a slave, but not the deterioration.'

In his political functions (munus publicum), filiusfamilias was entirely beyond the sphere of patria potestas. Quod ad jus publicum attinet non sequitur jus potestatis, Dig. 36, 1, 14, 1. 'The magisterial power of a filiusfamilias is unaffected by patria potestas.' Thus, a son could act as praetor, ibid, or as judex, Dig. 5, 1, 17, in a suit to which his father was a party. He could even preside as magistrate over his own adoption or emancipation: Si consul vel praeses filiusfamilias sit, posse eum apud semetipsum vel emancipari vel in adoptionem dari constat, Dig. 1, 7, 3, (which makes it doubtful how far political functions were suspended even by the state of mancipium or bondage). He could also be appointed guardian (tutor), for guardianship (tutela) was regarded as a public office. Filiusfamilias in publicis causis loco patrisfamilias habetur, veluti si vel magistratum gerat vel tutor detur, Dig. 1, 6, 9. 'A filiusfamilias in his public relations is deemed independent, for instance, as magistrate or as guardian.'

The above-stated incapacities of filiusfamilias were subject, however, to certain exceptions and modifications, which may now be briefly considered.

a. In certain cases filiusfamilias had an anomalous right of suing in his own name (suo nomine), i.e. not merely as procurator or attorney of his father, and even in opposition to his father's wishes. Filiusfamilias suo nomine nullam actionem habet nisi injuriarum, et quod vi aut clam, et depositi, et commodati, ut Julianus putat, Dig. 44, 7, 9. 'A filiusfamilias can only sue in his own name for outrage, by interdict for violent or clandestine disturbance, for deposit, for loan, according to Julian.' These suits, which, in spite of the statement in the text, were not the only, though perhaps the oldest, actions maintainable by a person under power, deserve a

brief explanation. Without the right to Honour, one of the primordial rights of humanity, a man is scarcely a freeman, and, accordingly, this right vests definitively in filiusfamilias, and does not again pass out of him to vest in his father. Any dishonouring outrage, therefore, gave filiusfamilias a right of bringing a civil action, called actio injuriarum, in his own name, and, if the offence was atrocious, or his father's character dubious, without his father's consent, Dig. 47, 10, 17, 13, although any pecuniary damages that he thereby recovered, being in the nature of property, were recovered for his father. The son under power was recognized, then, as invested with a vindictive right, though not with a proprietary right. The actio injuriarum was an action in bonum et aequum concepta (compare Dig. 44, 10, 11, 1, and Dig. 44. 7, 34, pr.), that is, the terms of the formula (conceptio) directed the judex to assess the damages not on any principle of civil law, but by his own sense of natural equity (aequum et bonum), and this form may have helped to make the action maintainable by one who on the principles of civil law was incompetent to sue. The interdict quod vi aut clam was maintainable by filiusfamilias on the same principle as the actio injuriarum, being a means of vindicating a dishonouring outrage inflicted on filiusfamilias by some violent disturbance of real property in defiance of his prohibitio or summons to stay operations and let the matter abide the result of a judicial trial. On the same principle a filiusfamilias disinherited or passed over in the will of his mother or maternal grandfather, as such disinheritance or pretermission was an implied imputation of turpitude or unworthiness and therefore dishonouring, might without the consent of his father (Dig. 5, 2, 22, pr.) vindicate his honour by impeaching the will of inofficiositas (immorality, or want of natural affection), although such querela inofficiosi testamenti, being in another point of view an hereditatis petitio or real action, was not properly maintainable by a filiusfamilias. If the plaintiff filiusfamilias could show that the disinheritance or omission was not due to his own demerits, he invalidated the will by a fictitious presumption of the testator's lunacy and made the testator intestate; and thus filiusfamilias vindicated his own character, but whatever share he recovered in the intestate succession vested in his father.

The right of filiusfamilias to sue by actio commodati or depositi was founded on a different principle. Suppose that filiusfamilias had borrowed or hired a thing that he afterwards lent or deposited;

his father, not being responsible for his son's debts, would not be interested in the recovery of the thing, and therefore was not entitled to sue the depositary or borrower: the son, however, would be answerable to the original lender or letter, and accordingly was allowed to sue in his own name. To avoid, however, contravening the civil law by affirming a proprietary right vested in a filiusfamilias, he did not sue by a formula in jus concepta, i.e. of the form, si paret oportere, 'if the plaintiff establish a right,' but by a formula in factum, of the form, si paret factum esse, 'if the plaintiff establish a fact.' It is remarkable that Gaius instances precisely the actio commodati and the actio depositi as having two forms, one in jus and another in factum (4 § 47); and we may conjecture that the latter was invented to be used under these very circumstances by filiusfamilias.

b. The latter periods of Roman law present a gradual emancipation of filiusfamilias by successive inventions of new kinds of peculium. As early as the time of Augustus the earnings of a filiusfamilias in military service were called castrense peculium and belonged to him in absolute proprietorship. Filiifamilias in castrensi peculio vice patrumfamiliarum funguntur, Dig. 4, 6, 2. 'A filiusfamilias in respect of his military acquisitions has the right of a paterfamilias.' Subsequently the earnings of filiifamilias in the civil service of the State, in holy orders, in the liberal professions, were assimilated to their earnings in the army, under the name of peculium quasi castrense. Further, whatever came to the son from his mother or from the maternal line, or from any source but the paternal estate, was called peculium adventicium, and in this the father had only a usufruct or life estate, while the son had the reversion in fee (proprietas). Only such peculium as was derived from the paternal estate (ex re patris) continued, under the name of peculium profecticium, subject to the old rules and belonged in absolute property to the father.

The Gallic race, of which the Galatians were a branch, are mentioned by Caesar as having the institution of patria potestas: Viri in uxores, sicuti in liberos, vitae necisque habent potestatem, De Bello Gall. 6, 19. 'Husbands and fathers have power of life and death over wives and children.' St. Paul in his Epistle to the Galatians alludes to the peculiarity of their law: 'The heir, as long as he is a child, differeth nothing from a servant, though he be lord of all;' 4, 1.

DE NUPTIIS.

§ 56. *Habent autem in potestate liberos cives Romani*, si cives Romanas uxores duxerint, vel etiam Latinas peregrinasve cum quibus conubium habeant. cum enim conubium id efficiat, ut liberi patris condicionem sequantur, evenit ut non *solum* cives Romani fiant, set *et* in potestate patris sint.

§ 56. A Roman citizen contracts civil wedlock and begets children subject to his power when he takes to wife a citizen of Rome or a Latin or alien with whom a Roman has capacity of civil wedlock; for as civil wedlock has the effect of giving to the children the paternal condition, they become by birth not only citizens of Rome, but also subject to the power of the father.

§ 57. Unde et veteranis quibusdam concedi solet principalibus constitutionibus conubium cum his Latinis peregrinisve quas primas post missionem uxores duxerint. et qui ex eo matrimonio nascuntur, et cives Romani et in potestatem parentum fiunt.

§ 57. And for this purpose veterans often obtain by imperial constitution a power of civil wedlock with the first Latin or alien woman they take to wife after their discharge from service, and the children of such marriages are born citizens of Rome and subject to paternal power.

§ 58. *Sciendum autem est non omnes nobis uxores ducere licere:* nam a quarundam nuptiis abstinere debemus.

§ 58. We must observe that it is not any woman that can be taken to wife, for some marriages are prohibited.

§ 59. Inter eas enim personas quae parentum liberorumve locum inter se optinent nuptiae contrahi non possunt, nec inter eas conubium est, velut inter patrem et filiam, v*el* matrem et filium, v*el* avum et neptem: et si tales personae inter se coierint, nefarias *atque incestas nuptias contraxisse dicuntur. et haec a*deo ita sunt, ut quamvis per adoptionem parentum liberorumve loco sibi esse coeperint, non possint inter se matrimonio coniungi, in tantum, ut et dissoluta adoptione idem iuris maneat: itaque eam quae nobis adoptione filiae aut neptis loco esse coeperit non poterimus uxorem ducere, quamvis eam emancipaverimus.

§ 59. Persons related as ascendent and descendent are incapable of lawful marriage or civil wedlock, father and daughter, for instance, mother and son, grandfather and granddaughter: and if such relations unite, their unions are called incestuous and nefarious; and so absolute is the rule that merely adoptive ascendents and descendents are so utterly prohibited from intermarriage that dissolution of the adoption does not dissolve the prohibition: so that an adoptive daughter or granddaughter cannot be taken to wife even after emancipation.

§ 60. Inter eas quoque personas quae ex transverso gradu cognatione iunguntur est quaedam similis observatio, sed non tanta.

§ 60. Collateral relatives also are subject to similar prohibitions, but not so stringent.

§ 61. Sane inter fratrem et sororem prohibitae sunt nuptiae, sive eodem patre eademque matre nati fuerint, sive alterutro eorum. sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem constat adoptio, sane inter me et eam nuptiae non possunt consistere; cum vero per emancipationem adoptio dissoluta sit, potero eam uxorem ducere; set *et* si ego emancipatus fuero, nihil inpedimento erit nuptiis.

§ 62. Fratris filiam uxorem ducere licet: idque primum in usum venit, cum divus Claudius Agrippinam, fratris sui filiam, uxorem duxisset. sororis vero filiam uxorem ducere non licet. et haec ita principalibus constitutionibus significantur. Item amitam et materteram uxorem ducere non licet.

§ 63. Item eam quae *nobis quondam socrus* aut nurus aut privigna aut noverca fuit. ide*o autem* diximus quondam, quia si adhuc constant eae nuptiae per quas talis adfinitas quaesita est, alia ratione *inter nos* nupti*ae* esse non possunt, quia neque eadem duobus nupta esse potest, neque idem duas uxores habere.

§ 64. Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur, neque liberos. *hi enim* qui ex eo coitu nascuntur, matrem quidem habere videntur, patrem vero non utique: nec ob id in potestate eius sunt, *sed* quales sunt ii quos mater vulgo concepit. *nam nec hi* patrem habere *omnino* intelleguntur, cum *his etiam* incertus sit; unde solent spurii *f*ilii appellari, vel a Graeca voce quasi σποράδην concepti, vel quasi sine patre filii.

§ 61. Brother and sister, indeed, are prohibited from intermarriage whether they are born of the same father and mother or have only one parent in common: but though an adoptive sister cannot, during the subsistence of the adoption, become a man's wife, yet if the adoption is dissolved by her emancipation, or if the man is emancipated, there is no impediment to their intermarriage.

§ 62. A man may marry his brother's daughter, a practice first introduced when Claudius married his brother's daughter Agrippina, but may not marry his sister's daughter, a distinction laid down in imperial constitutions, nor may he marry his father's sister or his mother's sister.

§ 63. He may not marry one who has been his wife's mother or his son's wife or his wife's daughter or his father's wife. I say, one who has been so allied, because during the continuance of the marriage that produced the alliance there would be another impediment to the union, for a man cannot have two wives nor a woman two husbands.

§ 64. A man who contracts a nefarious and incestuous marriage is not deemed to have either a wife or children; for the offspring of such a union are deemed to have a mother but no father, and therefore are not subject to paternal power; resembling children born in promiscuous intercourse, who are deemed to have no father, because their true father is uncertain, and who are called bastards either from the Greek word denoting illicit intercourse or because they are fatherless.

In any treatise on the law of marriage that we open we shall meet the expression, the marriage contract; and this suggests

the inquiry, is marriage a contract, and, if so, to which class of Roman contracts, Verbal, Literal, Real, Consensual, 3 § 89, is Roman marriage to be referred? Most writers assume that it was a Consensual contract, on the strength of texts like the following: Nuptias non concubitus sed consensus facit, Dig. 35, 1, 15. 'Marriage does not depend on cohabitation, but on consent.' Ortolan, however, remarks that consensual contracts could be formed by absent contractors, Inst. 3, 2, whereas a marriage could not be contracted in the absence of the wife, Paul, 2, 19, 18; and shows that, besides the consent of the parties, delivery of possession of the wife to the husband was required, from which he infers that Roman marriage was not a Consensual but a Real contract. It is true that marriage might be contracted in the absence of the husband: Vir absens uxorem ducere potest, femina absens nubere non potest, Paul, 2, 19, 8; but this was only under certain conditions. Mulierem absenti per literas ejus vel per nuntium posse nubere placet, si in domum ejus deduceretur; eam vero quae abesset ex literis vel nuntio deduci a marito non posse: deductione enim opus esse in mariti non in uxoris domum quasi in domicilium matrimonii, Dig. 23, 21, 5. 'A man in his absence may marry by letter or message, provided the woman is led to his house: a woman in her absence cannot marry by letter or message, for the leading must be to the husband's house, as the domicile of the married pair.' And precisely the same conditions were sufficient in other cases to constitute delivery of possession. Si venditorem quod emerim deponere in mea domo jusserim, possidere me certum est, quanquam id nemo dum attigerit, Dig. 41, 2, 18, 2. 'If a vendor deposit any article in my house by my order, I have possession of it though I have never touched it.' Consensus, then, in the above-quoted passage, is not opposed to delivery of possession, but to cohabitation, or to the use of certain words or certain documents, or to the solemn and graceful ceremonial with which custom surrounded the matrimonial union.

Real contracts, however, are executory on one side and executed on the other, whereas in the conjugal relation both parties are on the same footing in respect of execution; and we may ask whether marriage is a contract at all; whether it does not rather fall under the opposite category of alienation or conveyance. Instead of finding its analogon in locatio-conductio or societas (consensual contracts) or pignus or commodatum (real contracts), may we not

rather, with Savigny, find it in transfer of dominion or other creations of real right, such as adoption, the concession of patria potestas, or emancipation, investiture with independent status? Did not tradition, or delivery of possession, operate to engender, not a personal right, as in real contract, but a real right, as in alienation of ownership, 2 § 65? This seems the truer view, and if we use the expression, marriage contract, we must use the term contract not in a specific sense, as opposed to conveyance, but in the generic sense of bilateral disposition (as opposed to unilateral disposition, e.g. testation) a sense embracing both contract proper and conveyance, and extending beyond the sphere of Property into the relations of domestic life. Contract proper and conveyance, though generally contrasted in jurisprudence, have much in common. If contract in its narrower sense is defined to be the concurrence of two manifestations of will creating a jus in personam, and conveyance the concurrence of two manifestations of will creating a jus in rem, the concurrence of two manifestations of will creating a jus is an element common to both terms of the comparison, and this common element may be denominated in a generic sense a contract. Contract in the narrower sense may then be distinguished as an obligative contract and conveyance as a translative contract, and the latter head will include the contract of marriage, if we continue to employ this expression.

As in respect of property or dominion we find in Roman law the distinction of Quiritary and Bonitary, that is, of civil and gentile, ownership, so in respect of the conjugal relation we find the distinction of Roman or civil marriage (connubium, justae nuptiae, justum matrimonium) and gentile marriage (nuptiae, matrimonium), of which the former alone was valid at civil law (connubium est uxoris jure ducendae facultas, Ulpian, 5, 3; 'connubium is the capacity of marriage valid by civil law') and capable of producing patria potestas and agnatio, though the latter produced legitimate children (justi as opposed to naturales liberi) and cognatio or natural relationship.

Capacity of civil marriage (connubium) is (*a*) absolute and (*b*) relative. (*a*) Only citizens have the absolute capacity of civil marriage, and such Latins and aliens as are specially privileged, § 56: slaves are incapable both of civil and gentile marriage. (*b*) Capacity of civil marriage is, however, always relative to another person as forming the other party to the union. A citizen only has connubium with a citizen or with such Latins and aliens

as are specially privileged; and, before the lex Papia Poppoea was passed, a freeborn citizen (ingenuus) had no connubium with a citizen by manumission (libertinus). Lege Papia cavetur omnibus ingenuis praeter senatores eorumque liberos libertinam uxorem habere licere, Dig. 23, 2, 23. 'The lex Papia permits all freeborn citizens, except senators and their children, to marry freedwomen.'

§ 58. The prohibition of marriage between collateral relations, originally perhaps extended as far as there were legal names for the relationship, i. e. as far as the sixth degree, for Tacitus mentions that second cousins were once incapable of intermarriage, sobrinarum diu ignorata matrimonia, Ann. 12, 6; the prohibition was subsequently reduced to the fourth degree, i. e. to the intermarriage of first cousins (consobrini), Ulpian, 5, 6; and finally to the third degree; with this restriction, however, that if one of the collaterals was only removed by one degree from the common ancestor (stipes communis), he was regarded as a quasi ascendent (loco parentis) and incapable of intermarriage at any degree: thus, a man could not marry his brother's or sister's granddaughter, though only related in the fourth degree, Cod. 5, 4, 13. Degrees in the direct line were reckoned by counting the generations or births to which a person owed his descent from an ancestor: thus, a man is one degree from his father, two from his grandfather: in the transverse or collateral line, by adding the degrees which separate each collateral from the common stock; thus, a man is two degrees from his sister, three from his niece.

§ 62. Constantine restored the ancient law and prohibited marriage with a brother's daughter as incestuous, Cod. Theod. 1, 2.

§ 63. Alliance (affinitas) is the relationship of a person to the kin (cognates) of a spouse. The husband is allied to the kin of the wife, the wife to the kin of the husband; but there is no alliance between the kin of the husband and the kin of the wife. The following are some of the names given to these relationships. In the ascending line the father and mother of the wife or husband are socer and socrus (father-in-law, mother-in-law), and in relation to them the husband of the daughter and wife of the son are gener and nurus (son-in-law, daughter-in-law). In the descending line the children of the spouse are privignus and privigna (step-son, step-daughter), and in relation to them the husband of the mother and the wife of the father are vitricus and noverca (step-father and step-mother). In the collateral line the husband's brother is levir (brother-in-law),

the husband's sister is glos (sister-in-law). Intermarriage with allies in the direct line, or their ascendents or descendents, was absolutely prohibited; collateral alliance was no impediment in the time of Gaius, but at a later period marriage with a deceased brother's wife or a deceased wife's sister was forbidden, Cod. 5, 5, 5.

To the marriage of a filius- or filia-familias the consent of the father was required: but if he withheld it without a reason he could be compelled by the magistrate to give it, and, in the case of a daughter, to provide a dower, D. 23, 2, 19: one of several instances in which, as the condition of the validity of a title, when a voluntary action could not be obtained, the legislator substituted a compulsory action, instead of simply declaring the action unnecessary. See 1 § 190, com.

DE ERRORIS CAUSAE PROBATIONE.

§ 65. *Aliquando autem evenit, ut liberi qui statim ut na*ti sunt parentum in potestate non fiant, ii postea tamen redigantur in potestatem.

§ 65. It sometimes happens that children when first born are not in their father's power, but are subsequently brought into subjection to him.

§ 66. Itaque *si Latinus* ex lege Aelia Sentia uxore ducta filium procreaverit, aut Latinum ex Latina, aut civem Romanum ex cive Romana, non habebit eum in potestate: *at causa probata civitatem Romanam consequitur cum filio:* simul ergo eum in potestate sua habere incipit.

§ 66. Thus, under the lex Aelia Sentia a Latin who marries and begets a son of Latin status by a Latin mother, or a citizen of Rome by a Roman mother, is not invested with power over him; but on proof of his above-mentioned statutory title, he becomes a citizen of Rome along with his son, who is henceforth subject to his power.

§ 67. Item si civis Romanus Latinam aut peregrinam uxorem duxerit per ignorantiam, cum eam civem Romanam esse crederet, et filium procreaverit, hic non est in potestate, quia ne quidem civis Romanus est, sed aut Latinus aut peregrinus, id est eius condicionis cuius et mater fuerit, quia non aliter quisquam ad patris condicionem accedit, quam si inter patrem et matrem eius conubium sit: sed ex senatusconsulto permittitur causam erroris probare, et ita uxor quoque

§ 67. Again, if a Roman citizen marry a Latin or an alien woman in a mistaken belief that she is a citizen of Rome, the son whom he begets is not in his power, not being born a citizen of Rome, but a Latin or an alien, that is to say, of the same status as his mother, for a child is not born into the condition of his father unless his parents had capacity of civil marriage: but a senatusconsult allows the father to prove a cause of justifiable error, and then the wife and son become

et filius *ad* civitatem Romanam perveniunt, et ex eo tempore incipit filius in potestate patris esse. Idem iuris est, si eam per ignorantiam uxorem duxerit quae dedi*ti*ciorum numero est, nisi quod uxor non fit civis Romana.

citizens of Rome, and the son is thenceforth in the power of the father. The same relief is given when a Roman citizen under a like misconception marries a freedwoman having the status of a surrendered foe, except that the wife does not become a citizen of Rome.

§ 68. Item si civis Romana per errorem nupta sit peregrino tamquam civi Romano, permittitur ei causam erroris probare, et ita filius quoque et maritus ad civitatem Romanam perveniunt, et aeque simul incipit filius in potestate patris esse. Idem iuris est si peregrino tamquam Latino ex lege Aelia Sentia nupta sit: nam et de hoc specialiter senatusconsulto cavetur. Idem iuris est aliquatenus, si ei qui dedi*ti*ciorum numero est, tamquam civi Romano aut Latino e lege Aelia Sentia nupta sit: nisi quod scilicet qui dediticiorum numero est, in sua condicione permanet, et ideo filius, quamvis fiat civis Romanus, in potestatem patris non redigitur.

§ 68. Again, a female citizen of Rome who marries an alien in the false belief that he is a Roman citizen is permitted to prove a cause of justifiable error, and thereupon her son and husband become citizens of Rome, and simultaneously the son becomes subject to the power of his father. Similar relief is given if she marry an alien as a Latin intending to comply with the conditions of the lex Aelia Sentia, for this case is specially provided for in the senatusconsult. Similar relief is given to a certain extent if she marry a freedman having the status of a surrendered foe instead of a Roman citizen, or instead of a Latin, whom she intended to marry according to the provision of the lex Aelia Sentia, except that the freedman husband continues of the same status, and therefore the son, though he becomes a citizen of Rome, does not fall under paternal power.

§ 69. Item si Latina peregrino, quem Latinum esse crederet, nupserit, potest ex *senatusconsulto* filio *nato* causam *erroris* p*robare, et ita om*nes fiunt cives Romani, *et* filius in potestate patris esse incipit.

§ 69. Also a Latin freedwoman married to an alien whom she believed to be a Latin is permitted by the senatusconsult, on the birth of a son, to prove a cause of justifiable error, and thereupon they all become Roman citizens, and the son becomes subject to paternal power.

§ 70. *Idem iuris omnino est,* si Latinus per errorem peregrinam *qua*si Latin*am* aut civem Romanam e lege Aelia Sentia uxorem duxerit.

§ 70. Exactly the same relief is given if a Latin freedman mistakenly marry an alien woman instead of a Latin freedwoman, or a citizen of Rome, when he intended to comply with the lex Aelia Sentia.

§ 71. Praeterea si civis Romanus, qui se credidisse*t* Latinum, *duxisset* Latinam, permittitur e*i* filio nato

§ 71. Further, a Roman citizen who marries a Latin freedwoman, believing himself to be a Latin, is

erroris causam *pro*bare, *tamquam si ex* lege Aelia Sentia uxorem duxisset. Item h*is qui licet* cives Romani essent, peregrinos se esse cred*i*disse*nt* et peregrinas uxores duxissent, permittitur ex senatusconsulto filio nato causam erroris probare: quo facto peregrina uxor civis Romana *fit* et filius *quoque ita* non solum *ad civitatem Romanam perve*nit, sed *etiam in* potestatem patris *redigitur*.

permitted on the birth of a son to prove the cause of his mistake as if he had married according to the provisions of the lex Aelia Sentia. So, too, a Roman citizen, who marries an alien, believing himself to be an alien, is permitted by the senatusconsult on the birth of a son to prove the cause of the mistake, and then the alien wife becomes a Roman citizen, and the son becomes a Roman citizen and subject to the power of the father.

§ 72. Quaecumque de filio esse diximus, eadem et de filia dicta intellegemus.

§ 72. Whatever has been said of a son applies to a daughter.

§ 73. Et quantum ad erroris causam probandam attinet, nihil interest cuius aetatis filius sive filia *sit* . . . . Latinus . . . . qui . . . . nisi minor anniculo *sit* filius filiave, causa probari non potest. nec me praeterit in aliquo rescripto divi Hadriani ita esse constitutum, tamquam quod ad erroris quoque *causam* probandam [*desunt* 2. *lin.*] Imperator . . . . tuendam dedit.

§ 73. And as to the proof of the cause of error, the age of the son or daughter is immaterial, except that, if the marriage was contracted with an intention to satisfy the requirements of the lex Aelia Sentia, the child must be a year old before the cause can be proved. I am aware that a rescript of the late Emperor Hadrian speaks as if proof of the cause of error . . . .

§ 74. *Item* peregrino [3½ *lin.*] uxorem duxisset et filio nato alias civitatem Romanam consecutus esset, deinde cum q*uaereretur* an *causam* probare *posset*, *res*cripsit Imperator Antoninus perinde posse eum *causam pro*bare, atque si peregrinus mansisset. ex quo colligimus etiam peregrinum *causam* probare posse.

§ 74. When an alien, believed to be a Roman citizen, married a Roman wife, and subsequently to the birth of a son acquired the Roman franchise, the question arising whether he could prove the cause of error, a rescript of Antoninus Pius decided that he was just as competent to prove as if he had continued an alien: from which may be gathered that an alien is competent to prove the cause of error.

§ 75. *Ex iis* qua*e* diximus ap*paret* . . . . error*e* . . . . *peregrinus* [1½ *lin.*] qui*dem* . . . . errorem . . . . matrimonium . . . . ea quae superius . . . . nul*l*us *err*or intervenerit . . . . null*o* cas*u* . . . .

§ 75. It appears that an alien cannot acquire the Roman franchise under the lex Aelia Sentia, but may by proof of having contracted a marriage under a justifiable error.

Mistake or error sometimes conferred a right which a party could not have acquired if he had not acted under a mistake. Thus, the lender of money to a filiusfamilias without the father's consent

had no legal claim to recover, unless he lent believing the borrower to be independent (sui juris), and possession could not mature by usucapion into ownership, unless it had a bona fide inception, i. e. unless it commenced in an honest misunderstanding. The relief of error had similarly important results in questions of status. Erroris causam probare seems to mean 'to make good a title by error,' i. e. to establish, as title (causa) to relief, a probabilis error or justa ignorantia; i. e. a mistake not due to negligence; for negligence would exclude from relief.

The subjection of a child to patria potestas by erroris causae probatio operated to invalidate a previously executed will, like the subsequent birth (agnatio) of a child in civil wedlock (suus postumus), 2 § 142.

DE STATU LIBERORUM.

§ 76. [2 *lin.*] uxorem duxerit, *sicut supra quoque* di*x*imus, ius*tum* matrimonium contrahi et tunc ex iis *qui* nascit*ur*, civis Romanus est et in potestate patris erit.

§ 76. When a Roman takes to wife an alien privileged as I described (§ 56), he contracts a civil marriage, and his son is born a Roman citizen and subject to his power.

§ 77. Itaque si civis Romana peregrin*o nupserit, is qui nascitur, licet omni modo peregrinus sit, tamen interveniente conubio iustus* filius *est, tamquam* si ex peregrina eum procreasset. hoc *tamen tempore e* senatusconsulto quod auctore divo Hadriano factum est, *et*si non fuerit conubium inter civem Romanam et peregrinum, qui nascitur iustus patris filius est.

§ 77. So if a female Roman marry an alien with whom she has capacity of civil marriage, her son is an alien and a lawful son of his father, just as if his mother had been an alien. At the present day, by a senatusconsult passed on the proposition of the late Emperor Hadrian, even without civil marriage the offspring of a Roman woman and alien is a lawful son of his father.

§ 78. Quod autem diximus inter civem Romanam peregrinumq*ue matrimonio contracto eum qui* nascitur, peregrin*um* [*desunt* 11 *lin.*]

§ 78. The rule that when a female Roman citizen marries an alien with whom she has no capâcity of civil marriage the offspring is an alien is a statutory enactment: the rule that when a female alien marries a Roman citizen with whom she has no right of civil marriage the offspring is an alien is a disposition of Gentile law.

§ 79. A*deo* a*utem* hoc ita es*t*, u*t* [*desunt* 3 *lin.*] sed etiam, qui Latini nominantur: sed ad alios Latinos pertinet, qui proprios popu-

§ 79. And so the offspring of a Latin freedwoman by a Roman citizen with whom she has no capacity of civil marriage is a Latin,

los propriasque civitates habebant et erant peregrinorum numero.

although this is not provided in the statute; for the Latins mentioned in the statute are Latins in another sense, Latins by race and members of a foreign state, that is to say, aliens.

§ 80. *Eadem ratione* ex contrario ex Latino et cive *Romana qui nascitur*, civis Romanus nascitur. fuerunt tamen qui putaverunt ex lege Aelia Sentia contracto matrimonio Latinum nasci, *quia* videtur eo casu per legem Aeliam Sentiam et Iuniam conubi*um* inter eos dari, et semper conubium efficit, ut qui nascitur patris condicioni accedat: aliter vero contracto matrimonio eum qui nascitur iure gentium matris condicionem sequi. at *vero hodie civis Romanus* est; *scilicet* hoc iure utimur ex senatusconsulto, quo auctore divo Hadriano significatur, ut *omni modo* ex Latino et cive Romano natus civis Romanus nascatur.

§ 80. By the same principle, conversely, the son of a Latin and a Roman woman is by birth a Roman citizen. Some, however, thought that if the marriage was contracted in accordance with the lex Aelia Sentia, the offspring is a Latin by birth, because in this hypothesis the lex Aelia Sentia and Junia Norbana confer a capacity of civil marriage, and a civil marriage always transmits to the offspring the status of the father: if the marriage was otherwise contracted, they held the offspring acquires by Gentile law the status of his mother. However, it is now certain that the offspring is a Roman citizen in either case; for the senatusconsult passed on the proposition of the late Emperor Hadrian enacts that the son of a Latin and a Roman woman is under every hypothesis a Roman citizen.

§ 81. *His convenienter etiam illud* senatusconsulto divo Hadriano auctore significatur, ut ex Latino *et peregrina*, item contra ex peregrino *et Latina qui nascitur*, matris condicionem sequatur.

§ 81. Consistently herewith Hadrian's senatusconsult provides that the offspring of the marriage of a Latin freedman with an alien woman or of an alien with a Latin freedwoman follows the mother's condition.

§ 82. Illud quoque his conveniens est, quod ex ancilla et libero iure gentium servus nascitur, et ex libera et servo liber nascitur.

§ 82. Consistently herewith the offspring of a female slave and a freeman is by Gentile law a slave, the offspring of a freewoman and a slave is free.

§ 83. Animadvertere tamen debemus, ne iuris gentium regulam vel lex aliqua vel quod legis vicem optinet, aliquo casu commutaverit.

§ 83. We must observe, however, whether the law of nations in any given instance is overruled by a statute or ordinance having the authority of a statute.

§ 84. Ecce enim ex senatusconsulto Claudiano poterat civis Romana quae alieno servo volente

§ 84. For instance, the Sc. Claudianum permitted to a female citizen of Rome having intercourse

domino eius coiit, ipsa ex pactione libera permanere, sed servum procreare: nam quod inter eam et dominum istius servi convenerit, ex senatusconsulto ratum esse iubetur. sed postea divus Hadrianus iniquitate *rei* et inelegantia iuris motus restituit iuris gentium regulam, ut cum ipsa mulier libera permaneat, liberum pariat.

with a slave with his owner's consent, to continue herself in virtue of the convention free, while she gave birth to a slave, her agreement to that effect with the owner being made valid by the senatusconsult. Subsequently, however, the late Emperor Hadrian was induced by the injustice and anomaly of the ordinance to re-establish the rule of Gentile law, that as the mother continues free the offspring follows her status.

§ 85. Ex lege . . . . *ex an*cilla et libero poterant liber*i* nasci: nam ea lege cavetur, ut si quis cum aliena ancilla quam credebat liberam esse coierit; si quidem masculi nascantur, liberi sint, si vero feminae, ad e*u*m per*t*ineant cuius mater ancilla fuerit. sed et in hac specie divus Vespasianus in*e*legantia iuris motus restituit iuris gentium regulam, ut omni modo, etiam si masculi nascantur, servi sint eius cuius et mater fuerit.

§ 85. By the (same) law the offspring of a female slave by a freeman might be free, for that law provided that the offspring of a freeman by another person's female slave whom he believed to be free shall be free if they are male, but shall belong to their mother's proprietor if they are female: but here too the late Emperor Vespasian was moved by the anomalous character of the rule to re-establish the canon of Gentile law, and declared that the offspring in every case, whether male or female, should be slaves and the property of their mother's owner.

§ 86. Sed illa pars eiusdem legis salva est, ut ex libera et servo alieno, quem sciebat servum esse, servi nascantur. itaque apud quos talis lex non est, qui nasci*tur* iure gentium matris condicionem sequi*tur* et ob id liber est.

§ 86. But another clause of that law continues in force, providing that the offspring of a freewoman by another person's slave whom she knows to be a slave are born slaves, though where this law is not established the offspring by Gentile law follow the mother's condition and are free.

§ 87. Quibus autem casibus matris et non patris condicionem sequitur qui nascitur, *i*isdem casibus in potestate eum patris, etiamsi is civis Romanus sit, non esse plus quam manifestum est. et ideo superius rettulimus, quibusdam casibus per errorem non iusto contracto matrimonio senatum intervenire et emendare vitium matrimonii, eoque modo plerumque efficere, ut

§ 87. When the child follows the mother's condition instead of the father's, it is obvious that he is not subject to the power of the father, even though the father is a Roman citizen: but in some cases, as I mentioned above (§ 67), when a mistake was the occasion of a non-civil marriage being contracted, the senate interferes and purges the defect of the marriage, and this

in potestatem patris filius redigatur.	generally has the effect of subjecting the son to the power of the father.

The rules relating to the status of the offspring of parents of unequal status are at first sight chaotic and bewildering, but they are reducible to a few canons. The most general canon is the rule of Gentile law, that children follow the condition of the mother. This is subject to two exceptions.

1. Children born in civil wedlock follow the condition of the father.

2. Children born in gentile (lawful) wedlock of a Roman mother and alien father follow the condition of the father: this was a special enactment of the lex Mensia. These rules are stated in the following passages: Lex naturae haec est ut qui nascitur sine legitimo matrimonio matrem sequatur nisi lex specialis aliud inducat, Dig. 1, 5. 'By the law of nature children not born in civil wedlock follow the status of the mother, in the absence of a special statute to the contrary.' Connubio interveniente liberi semper patrem sequuntur: non interveniente connubio, matris conditioni accedunt, excepto eo qui ex peregrino et cive Romana peregrinus nascitur, quoniam lex Mensia ex alterutro peregrino natum deterioris parentis conditionem sequi jubet, Ulpian, 5, 8. 'In civil wedlock the children have the status of the father, in the absence of civil wedlock of the mother; except that the children of an alien father and Roman mother are aliens, as the lex Mensia makes the children aliens when either parent is an alien.'

The Sc. Claudianum introduced some special enactments respecting the intercourse of freewomen with slaves, which, however, were subsequently abolished.

a. If a freewoman had intercourse with a slave with the consent of his proprietor she retained her freedom, though degraded to the class of a freedwoman, but her issue was the slave of the proprietor. The slavery of the issue was abolished by Hadrian, § 84.

b. If a freewoman persisted in intercourse with the slave of another person against the will and in spite of the prohibition of the proprietor, after three denunciations on his part she was awarded to him by the magistrate as a slave, and her issue, whether born before or after the adjudication, became slaves of the same person, who also acquired her estate by a species of universal succession. This terroristic law, which, from the minuteness with which the

details are developed (Paulus, 2, 21), appears to have been often applied, was not abrogated till the time of Justinian, Inst. 3, 12, 1.

c. If a freeman had intercourse with a slave whom he supposed to be free, her male children were born into freedom. This relief of error was abolished by Vespasian as anomalous (inelegans), § 85.

§ 77. The paragraph is imperfect and, perhaps for that reason, its drift is obscure. In what sense could a Roman woman be said to have connubium with an alien? We may conjecture that at one time such marriages, by some special statute or positive enactment, were invalid, and not even admitted as valid by Gentile law; that is, that the children were deemed to be bastards. Individuals who obtained a special release from this incapacity would have connubium, and the children of the marriage would by the general rule follow the status of the father. Hadrian seems to have repealed the general disability and made the marriage valid in all cases, i. e. a good gentile marriage even without the grant of connubium; but the lex Mensia, of uncertain date, declared that in this case Gentile law should not operate to give the children the status of the mother.

§ 80. There was not much plausibility in the view that a marriage under the lex Aelia Sentia, merely because it was statutory (regulated by statute), was therefore a civil marriage; and we may regard the senatusconsult of Hadrian, which denied its civil character, as purely declaratory.

§ 88. Sed si ancilla ex cive Romano conceperit, deinde manumissa civis Romana facta sit, et tunc pariat, licet civ*is* Romanus sit qui nascitur, sicut pater eius, non tamen in potestatem patris est, quia neque ex iusto coitu conceptus est, neque ex ullo senatusconsulto talis coitus quasi iustus constituitur.

§ 88. If a female slave conceive by a Roman citizen and become by manumission a citizen of Rome before giving birth to a son, her son, though a citizen of Rome like his father, is not in his father's power, because he was not begotten in civil wedlock, and there is no senatusconsult which cures the defect of the intercourse in which he was begotten.

§ 89. Quod autem placuit, si ancilla ex cive Romano conceperit, deinde manumissa pepererit, qui nascitur liberum nasci, *na*turali ratione fit. nam hi qui illegitime concipiun-

§ 89. The decision that when a female slave conceives by a Roman citizen and is manumitted before childbirth, her offspring is born free, is a rule of natural law; for in

tur, statum sumunt ex eo tempore quo nascuntur: itaque si ex libera nascuntur, liberi fiunt, nec interest ex quo mater eos conceperit, cum ancilla fuerit. at hi qui legitime concipiuntur, ex conceptionis tempore statum sumunt.

illegitimate or non-civil conception the status of the offspring depends on the moment of birth, and the mother's freedom at the moment of birth makes the offspring free, and the status of the father is immaterial: but in legitimate or civil conception the status of the child is determined by the time of conception.

§ 90. Itaque si cu*i* mulieri *civi Romanae praegnanti* aqua et igni *inter*dictum fuerit, eoque modo peregrina *fiat*, *e*t tunc pariat, conplures distinguunt et puta*nt*, si quidem ex iustis nuptiis conceperit, civem Romanum ex ea nasci, si vero volgo conceperit, peregrinum ex ea nasci.

§ 90. Accordingly, if a female citizen of Rome being pregnant is interdicted from fire and water, and becoming thus an alien gives birth to a child, many jurists distinguish and hold that her offspring is a Roman citizen if begotten in civil wedlock, but if in promiscuous intercourse, an alien.

§ 91. Item si qua mulier civis Romana praegnas ex senatusconsulto Claudiano ancilla facta sit ob id, quod alieno servo *coierit* denuntiante domino eius, conpl*ures distingu*unt et existimant, si quidem ex iustis nuptiis conce*pe*rit, civem Romanum ex ea nasci, si vero volgo conce*perit*, *servum* nasci eius cuius mater facta est ancill*a*.

§ 91. So if a female citizen of Rome being pregnant is reduced to slavery under the Sc. Claudianum for having intercourse with a slave against the prohibition of his owner, many jurists make a distinction and hold that her offspring, if conceived in civil wedlock is a citizen of Rome, if conceived in illicit intercourse is a slave of the person who becomes proprietor of the mother.

§ 92. *Item pereg*rina quoque si vulgo conceperit, deinde civis Romana *facta sit*, *et pa*riat, civem Romanum parit; si vero ex peregrino, *cui* secundum leges moresque peregrinorum coniuncta *est*, videtur ex senatusconsulto quod auctore divo Hadriano factum *est* peregrinus *nasci*, n*isi* patri *e*ius civitas Romana q*uaesita* sit.

§ 92. Also if an alien woman conceive in illicit intercourse and afterwards becomes a Roman citizen and gives birth to a child, the child is a Roman citizen; but if she conceived by an alien, to whom she was married in accordance with alien laws and customs, it seems that under Hadrian's senatusconsult her offspring is born an alien, unless the father also has acquired the Roman franchise.

Supposing the status of a parent changes during the period of gestation (if, for instance, the mother is a slave at the time of conception and free at the time of birth), what effect has this on the status of the issue? The following rule was adopted: in cases where the child follows the status of the father, that is, when it is begotten in civil marriage, the status of the father at the time of conception determines the status of the child; where the child

follows the status of the mother, that is, when it is begotten in gentile marriage or in promiscuous intercourse, the status of the child is determined by the status of the mother at the moment of birth. In his qui jure contracto matrimonio nascuntur, conceptionis tempus spectatur; in his autem qui non legitime concipiuntur, editionis, Ulpian, 5, 10. 'Children born in civil wedlock have their status fixed at the time of conception; children born out of civil wedlock have their status fixed at the time of delivery.' That is to say, the legal position of the issue is made to follow the analogy of its physical condition. The physical influence of the father terminates with conception: his subsequent health, life, or death, does not affect the physical state of the child; but the child is affected by every change in the physical condition of the mother, her health, life, or death, up to the moment of birth. In imitation of this analogy, the status of the child, when it depended on the status of the father, was not affected by any change in that status subsequent to the period of conception; but when it depended on the status of the mother it varied with every change in that status up to the moment of birth. By the time of Gaius, though the change is not mentioned in the text, this rule was modified in favour of liberty, and it was established that if the mother was free either at the date of conception or at the date of birth or at any intermediate period, the issue was born free. Si libera conceperit et ancilla facta peperit, liberum parit, id enim favor libertatis exposcit. Si ancilla conceperit et medio tempore manumissa sit, rursus facta ancilla peperit, liberum parit, media enim tempora libertati prodesse, non nocere etiam possunt, Paulus, 2, 24, 2.

§ 88. The issue of a mother who was a slave at the date of conception but is a citizen at the date of birth, though it is born a Roman citizen, is not subject to patria potestas, because it does not satisfy the definition in § 55, liberi quos justis nuptiis procreavimus, 'a child begotten in civil wedlock.'

§ 90. Aquae et ignis interdictio was originally a permission to avoid punishment under the penal code by voluntary exile. Subsequently it was employed as a punishment, and under the emperors assumed the form of deportatio in insulam. It was attended with confiscation of goods, and involved loss of civitas but not of libertas, § 161.

§ 92. The offspring of a wedded mother who was an alien at the date of conception and is a citizen at the date of birth, according to

the general rule of gentile law, should be born a Roman citizen; but this would contravene the above-mentioned lex Mensia, which enacted that the issue of a marriage is an alien whenever either parent is an alien. We may from this passage conjecture that what Ulpian calls the lex Mensia (a law not elsewhere quoted) was identical with what Gaius calls the senatusconsult of Hadrian, and was a comprehensive ordinance, regulating the conditions and effect of gentile marriages.

§ 93. Si peregrinus *cum liberis civitate Romana donatus fuerit*, non ali*ter f*ilii in potestate *eius f*iun*t*, q*uam* si *Imperator eos in potestatem* rede*ger*it. quod ita demum is facit, si causa cognita aestimaverit hoc filiis expedire: diligentius atque exactius *enim* causam cognoscit de impuberibus absentibusque. et haec ita edicto divi Hadriani significantur.

§ 93. If an alien and his children receive a grant of Roman citizenship, the children do not fall under the power of the father except by express ordinance of the emperor, which he only makes if, on hearing the facts of the case, he deems it expedient for the interest of the children, and only after a careful and minute inquiry if they are infants and absent, as an edict of the Emperor Hadrian intimates.

§ 94. Item si *q*uis cum uxore praegnante civitate Romana donatus sit, quamvis is qui nascitur, ut supra diximus, *civis* Romanus sit, tamen in potestate patris non fit: idque subscriptione divi Hadriani significatur. qua de causa qui intellegit uxorem suam esse praegnatem, dum civitatem sibi et uxori ab Imperatore petit, simul ab eodem petere debet, ut eum qui natus erit in potestate sua habeat.

§ 94. Also if an alien and his pregnant wife receive a grant of Roman citizenship, the child, though a Roman citizen, as above mentioned, is not born in the power of his father according to a rescript of the late Emperor Hadrian; wherefore, if he knows his wife to be pregnant, an alien who petitions the emperor for the Roman franchise for himself and his wife ought at the same time to petition that his son may be subjected to his power.

§ 95. Alia causa est eorum qui Latini sunt *et* cum liberis suis ad civitatem Romanam perveniunt: nam horum i*n potestate fiunt* liberi. quod ius quibusdam pe*regrinis* . . . . [*desunt lin.* 4.]

§ 95. The rule is different for Latins who with their children are made citizens of Rome, for their children fall under their power, and a similar right is conceded to certain aliens under the denomination of greater Latinity.

§ 96. Magistratum gerunt, civitatem Romanam consequuntur; minus latum [*Latium?*] est, cum hi tantum qui vel magistratum vel honorem gerunt ad civitatem Romanam perveniunt. idque conpluri-

§ 96. Greater Latinity is the right whereby the magistrates of certain towns acquire the Roman franchise along with their wives and children: lesser Latinity is the right whereby the magistrates themselves

bus epistulis Principum significatur. [1 *lin.*]

acquire the Roman franchise, but not their wives and children, a distinction intimated by several imperial rescripts.

The grant of civitas was either made to communities or to individuals. It was a lucrative sourse of revenue to the emperors. The fees to be paid were not small, Acts of the Apostles, 22, 28, and the new-made civis was regarded as a manumitted slave of the emperor, and was expected to remember the emperor in his will. The philosophic emperor, Marcus Aurelius, under whom Gaius flourished, granted the Roman franchise to all who were ready to pay the fees, data cunctis promiscue civitas Romana, Aurelius Victor, 16. Antoninus Caracalla, A.D. 211—217, after raising from one-twentieth to one-tenth the tax on manumissions and the testamentary succession and legacy duty, which was only levied on Roman citizens, exhausted for a time this source of revenue by conferring at a stroke the Roman franchise on every free subject of the empire: In orbe Romano qui sunt, ex constitutione imperatoris Antonini cives Romani effecti sunt, Dig. 1, 5, 17. This was not a general manumission of slaves nor an abolition of the status of Latin or alien, but a grant of the franchise to all existing Latins and aliens, imposing in effect a capitation tax on the individuals, and leaving those orders to be again replenished by subsequent manumissions of Latini and dediticii. The value of the privileges of civis Romanus was gradually declining. The political portions of civitas had been extinguished by the establishment of the empire, and Rome was destined at last to undergo the fate she had inflicted on so many other cities. She was sacked by Alaric, king of the Goths, A.D. 410. She was entered by Genseric, king of the Vandals, and, after a sack of fourteen days, left a heap of ruins, A.D. 455. The splendour of the title of civis Romanus was sadly dimmed before Justinian made it acquirable by every form of manumission.

§ 94. Subscriptio was an imperial rescript written under the petition to which it was an answer: a rescript written on a separate document was called epistola. The latter was addressed to public functionaries, the former to private individuals, and by its connection with the petition enabled a tribunal to which it was submitted to investigate the truth of the allegations on which it was founded.

The grant of patria potestas by the sovereign power to the new-

made citizen may be assimilated to the legislative grant of patria potestas in adrogatio. Its different effects may be compared with the incidents of Naturalization and Denization in English law. Naturalization by act of parliament is retrospective, and puts an alien in exactly the same state as if he had been born in the king's ligeance, and his son born before the naturalization may inherit: whereas the issue of a Denizen (an alien born who has obtained ex donatione regis letters patent to make him an English subject) cannot inherit to him, but his issue born after may. Blackstone.

§ 96. The terms greater Latinity, lesser Latinity (Latium majus, Latium minus), are not legible in the manuscript of Gaius, but both Niebuhr and Mommsen suppose that they formed the subject of the present paragraph.

DE ADOPTIONIBUS.

§ 97. *Non solum tamen naturales liberi, secundum ea quae* diximus, in potestate nostra sunt, verum et hi quos adoptamus.

§ 97. Not only natural children are subject, as mentioned, to paternal power, but also adoptive children.

§ 98. Adoptio autem duobus modis fit, aut populi auctoritate, aut inperi*o* magistratus, vel*ut* Praetoris.

§ 98. Adoption is of two forms, adoption by permission of the sovereign and adoption by the judicial authority of a magistrate, for instance, by the judicial authority of the praetor.

§ 99. Populi auctoritate adoptamus eos qui sui iuris sunt: qu*ae* species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur an velit eum quem adoptaturus sit iustum sibi filium esse; e*t* is qui adoptatur rogatur an id fieri patiatur; et populus rogatur an id fieri iubeat. Imperio m*a*gistratus adoptamus eos qui in potestate parentium sunt, s*i*v*e* primum gradum liberorum optineant, qualis est filius et filia, sive inferiorem, qualis est nepos, neptis, pronepos, proneptis.

§ 99. Permission of the sovereign is required for the adoption of an independent person, and this form is called adrogation, because the adopter is interrogated whether he wishes to have the person adopted for his lawful son, the person adopted is interrogated whether he thereto consents, and the legislature is interrogated whether such is its command. The judicial authority of a magistrate gives validity to the adoption of a person subject to the power of an ascendent, whether a descendent in the first degree, as a son or daughter, or in a remoter degree, as a grandson or granddaughter, great-grandson or great-granddaughter.

§ 100. Et quidem illa adoptio quae per populum fit nusquam nisi

§ 100. Adoption by the sanction of the legislature can only be so-

Romae fit: at haec etiam in provinciis aput Praesides earum fieri solet.

lemnized at Rome, the other process can be performed in the provinces in the court of the president.

§ 101. Item per populum feminae non adoptantur; nam id magis placuit. Aput Praetorem vero vel in provinciis aput Proconsulem Legatumve etiam feminae solent adoptari.

§ 101. Adoption by legislative sanction is inapplicable to females, as has finally been ruled; but females may be adopted by the other mode of adoption, at Rome in the court of the praetor, in provinces of the people in the court of the proconsul, in provinces of the emperor in the court of the legate.

§ 102. Item inpuberem aput populum adoptari aliquando prohibitum est, aliquando permissum est. nunc ex epistula optimi Imperatoris Antonini quam scripsit Pontificibus, si iusta causa adoptionis esse videbitur, cum quibusdam condicionibus permissum est. aput Praetorem vero, et in provinciis aput Proconsulem Legatumve, cuiuscumque aetatis adoptare possumus.

§ 102. The legislative adoption of a child below the age of puberty was at one time prohibited, at another permitted; at the present day, by the epistle of the Emperor Antoninus addressed to the pontifices, on evidence of a just cause of adoption, it is permitted, subject to certain conditions. In the court of the praetor at Rome, in the court of the proconsul in a province of the people, and in the court of the legate in a province of the emperor, a person of any age may be adopted.

§ 103. Illud vero utriusque adoptionis commune est, quia et hi qui generare non possunt, quales sunt spadones, adoptare possunt.

§ 103. Both forms of adoption agree in this point, that persons incapable of procreation by natural impotence are permitted to adopt.

§ 104. Feminae vero nullo modo adoptare possunt, quia ne quidem naturales liberos in potestate habent.

§ 104. Women cannot adopt by either form of adoption, for even their natural children are not subject to their power.

§ 105. Item si quis per populum sive apud Praetorem vel aput Praesidem provinciae adoptaverit, potest eundem alii in adoptionem dare.

§ 105. He who has adopted a person either by the sanction of the legislature or by the judicial authority of the praetor or of the president of a province, can transfer his adoptive son to another adoptive father.

§ 106. Set illa quaestio est, an minor natu maiorem natu adoptare possit: *idque* utriusque adoptionis commune est.

§ 106. Whether a younger person can adopt an older is a disputed point in both forms of adoption.

§ 107. Illud proprium est eius adoptionis quae per populum fit, quod is qui liberos in potestate habet, si se adrogandum dederit, non

§ 107. It is peculiar to adoption by the sanction of the legislature, that children in the power of the person adrogated, as well as their

solum ipse potestati adrogatoris subicitur, set etiam liberi eius in eiusdem fiunt potestate *t*anquam nepotes.

father, fall under the power of the adrogator, assuming the position of grandchildren.

Adrogation, or the adoption of an independent person (paterfamilias), reducing him to a dependent status (filiusfamilias), was a legislative act of the Comitia Curiata; but though, as representing the people, this assembly was legally omnipotent, it was unconstitutional to deprive a person either of the franchise or of domestic independence without his own consent. We learn from Cicero the formula by which this assent was ascertained: Sed quum hoc juris a majoribus proditum sit ut nemo civis Romanus aut libertatem (Mommsen conjectures: sui potestatem, but this in popular language may have been included under libertatem) aut civitatem possit amittere, nisi ipse auctor factus sit, quod tu ipse potuisti in tua causa discere: credo enim, quanquam in ista adoptione legitime factum est nihil, tamen te esse interrogatum, auctorne esses, ut in te P. Fonteius vitae necisque potestatem haberet ut in filio—quaero si aut negasses aut tacuisses, si tamen id triginta curiae jussissent, num id jussum esset ratum? De Domo, 29. 'As it is an immemorial rule of law that no citizen of Rome shall be deprived of independence or the franchise against his will, as you have had occasion of learning by your own experience, for I suppose that, illegal as your adrogation was in all points, you at least were asked whether you consented to become subject to the adrogator's power of life and death as if you were his son;—if you had opposed or been silent, and the thirty Curiae had nevertheless passed the law, tell me, would their enactment have had any binding force?' The form in which the law was proposed to the legislative assembly is given by Gellius: Adrogantur hi qui, cum sui juris sunt, in alienam sese potestatem tradunt ejusque rei ipsi auctores fiunt. Sed adrogationes non temere nec inexplorate committuntur: nam comitia, arbitris pontificibus, praebentur, quae curiata appellantur, aetasque ejus qui adrogare vult, an liberis potius gignundis idonea sit, bonaque ejus qui adrogatur ne insidiose adpetita sint, consideratur, jusque jurandum a Q. Mucio, pontifice maximo, conceptum dicitur, quod in adrogando juraretur. . . . . Adrogatio autem dicta quia genus hoc in alienam familiam transitus per populi rogationem fit. Ejus rogationis verba haec sunt. Velitis, jubeatis, uti L. Valerius L. Titio tam jure legeque filius siet, quam si ex eo patre matreque

familias ejus natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est. Haec ita uti dixi, ita vos, Quirites, rogo. 5, 19. 'Adrogation is the subjection of an independent person with his own consent to the power of a superior, and is not transacted in the dark or without investigation. The Comitia Curiata, at which the College of Pontiffs is present, are convened, and examine whether the age of the adrogator does not rather qualify him for the natural procreation of children, and whether the estate of the adrogatus is not the object of fraudulent cupidity, and an oath, said to be framed by Q. Mucius, the high pontiff, has to be taken by the adrogator. . . . Adrogation, the name given to this transit into a strange family, is derived from the interrogation of the legislative body, which is in the following form: 'May it please you to will and command that L. Valerius shall be as completely by law and statute the son of L. Titius, as if he were born of L. Titius and his wife, and that L. Titius shall have power of life and death over L. Valerius as a father has over his son. Do you will and command as I have said, Quirites?' Those who voted in affirmation of the measure proposed said (at least in other similar assemblies): Uti rogas; those who voted against it said: Antiquo. Women were originally incapable of being adrogated, because they were incapable of appearing in the Comitia Curiata, Quoniam cum feminis nulla comitiorum communio est, Gellius, ibid.; but this incapacity vanished as soon as the lex Curiata, as form of adrogation, was superseded by imperial rescript (principale rescriptum), Dig. 1, 7, 21. Women, being incapable of exercising parental power, could not, properly speaking, adrogate; but they were permitted by quasi adrogation to establish the same legal relation as existed between a mother and her natural children, Cod. 8, 48, 5. An adrogator was usually required to be sixty years old, Dig. 1, 7, 15, and to be eighteen years (plena pubertate) older than adrogatus, Inst. 1, 11, 4. Originally a youth must have attained the age of puberty before he could be adrogated, § 102: Sed adrogari non potest nisi jam vesticeps . . . . quoniam tutoribus in pupillos tantam esse auctoritatem potestatemque fas non est, ut caput liberum fidei suae commissum alienae ditioni subiciant, Gellius, ibid. 'A youth cannot be adrogated before he has assumed the toga virilis, because a guardian has no authority or power to subject an independent person, with whose charge he is entrusted, to the domination of a stranger.' The purple-edged praetexta was generally laid aside by boys along with

the bulla aurea which they wore round their neck, on the first Liberalia, the 17th March, Ovid, Fasti, 3, 771, after the completion of their fourteenth year. Females did not lay aside the praetexta till their marriage. Antoninus Pius permitted the adrogation of youths below the age of puberty (impubes, investis) under certain conditions; e. g. the adrogator entered into a stipulation, originally with a public slave, in later times with a public notary (tabularius), in the event of the death of adrogatus before the age of puberty, to restore his estate to his natural heirs, and, in the event of emancipation, to adrogatus himself: and adrogatus became entitled to a fourth part of the estate of adrogator (called quarta Antonini), of which he could not be deprived by disinherison or by unmerited emancipation. In the time of Justinian the adrogator only acquired in any case an usufruct or life estate in the property of adrogatus, which reverted to adrogatus after the death of adrogator; that is to say, the property of adrogatus was transformed by adrogation into peculium adventicium.

The form of adoption is explained below, § 134, under the head of dissolution of patria potestas, for as patria potestas is vested by adoption in the adoptive father, so it is divested from the natural father. The contrasted forms of adrogation and adoption are mentioned in juxtaposition by Suetonius: Gaium et Lucium adoptavit, domi per assem et libram emptos a patre Agrippa . . . Tertium nepotem Agrippam simulque privignum Tiberium adoptavit in foro lege curiata, Augustus, 64. 'Augustus adopted his daughter's sons, Gaius and Lucius, by (fictitious vindication after) a private conveyance by bronze and balance from their father Agrippa. His third grandson Agrippa and his stepson Tiberius he adrogated in the forum by a law of the Comitia Curiata.' These comitia had long been merely fictitious forms, the thirty curiae being symbolized by thirty lictors.

The effect of adoption was much reduced by a constitution of Justinian. If the adoption was by an ascendent, maternal or paternal, it retained its old character: but if it was by a stranger it neither created nor extinguished patria potestas; it did not transfer the adopted son from his old family into a new family, and therefore it neither destroyed nor created any tie of agnation: its only effect was to give to the adoptive son, in the event of intestacy, a claim against the estate of the intestate adoptive father; Cod. 8, 48, 10.

Besides the two modes of originating patria potestas which we have hitherto examined, birth in civil wedlock and adoption, subsequently to the time of Gaius a third mode was introduced, called by modern jurists Legitimation. This was the promotion of naturales liberi, children born in concubinatus, or cohabitation without matrimony, to the position of justi liberi, children born in lawful wedlock, which, after the extension of the franchise by Caracalla, would mean the same as children born in civil wedlock. Concubinatus was a relation partially recognized by the law, and children born in concubinage, though they had no right, by title of cognation, to the succession of their father, were recognized as cognates of their mother, and differed from children born in promiscuous intercourse (stuprum), inasmuch as their father was not considered incertus. There were three modes of the legitimation of natural children, subsequent marriage, destination to the municipal senate (curiae oblatio), and imperial rescript. Legitimation by subsequent marriage was introduced by Constantine, A.D. 335. Legitimation by destination to the senate was introduced by Theodosius and Valentinian, A.D. 443, with the design of replenishing the order of municipal senators (curiales, decuriones), much reduced in the time of the later emperors in consequence of the general disinclination to belong to a class, subject, along with various apparent privileges, to many onerous and intolerable obligations. To fill the gaps in this order, a father was permitted to legitimate his natural child by making him a senator of his municipality (civitas), and was relieved from the restrictions limiting the amount devisable by testators to natural children, Cod. 5, 27, 3. Legitimation by imperial rescript was introduced by Justinian.

The laws recognizing concubinatus were abrogated by Leo Philosophus, A.D. 887. It was in answer to a proposition of the bishops to introduce legitimation by subsequent wedlock that the English Lords at the Parliament of Merton used the celebrated expression: Nolumus leges Angliae mutari, 20 Hen. 3, c. 9, A.D. 1236.

DE MANU.

§ 108. *Nunc de his personis videamus quae in manu nostra sunt. quod* et ipsum ius proprium civium Romanorum est.

§ 109. Sed in potestate quidem

§ 108. Let us next proceed to consider what persons are subject to the Hand, another right only vested in citizens of Rome.

§ 109. Power is a right over

et masculi et feminae esse solent: in manum autem feminae tantum conveniunt.

males as well as females: Hand relates exclusively to females.

§ 110. Olim itaque tribus modis in manum conveniebant, usu, farreo, coemptione.

§ 110. In former days there were three modes of becoming subject to Hand, possession, confarreation, coemption.

§ 111. Usu in manum conveniebat quae anno continuo nupta perseverabat; q*uae enim* velut annua possessione usucapiebatur, in familiam viri transibat filiaeque locum optinebat. itaque lege duodecim tabularum cautum *erat*, si qua nollet eo modo in manum mariti conv*enire, ut quotan*nis trinoctio abesset a*t*que *ita usum* cuiusque anni interrumperet. set hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitteratum est.

§ 111. Possession invested the husband with right of Hand after a whole year of unbroken cohabitation. Such annual possession operated a kind of usucapion, and brought the wife into the family of the husband, where it gave her the status of a daughter. Accordingly, the law of the Twelve Tables provided that a wife who wished to avoid subjection to the Hand of the husband should annually absent herself three nights from his roof to bar the annual usucapion: but this proceeding is partly abolished by statute, partly obliterated by mere disuse.

§ 112. Farreo in manu*m* conveniunt *per* quoddam genus sacrificii . . . . in quo farreus panis adhibetur: unde etiam confarreatio dicitur. *sed co*nplura praeterea huius iuris ordinandi gratia cum certis et sollemnibus verbis, praesentibus decem testibus aguntur et fiunt. quo*d* ius etiam nostris temporibus in usu est: nam flamines maiore*s*, id est Diales, Martiales, Quirinales, sic*ut reges* sacrorum, nisi s*int* co*n*farreati*s* n*uptiis nati, inaugurari non* videm*us* . . . . co*n*farreatio . . . .

§ 112. Confarreation, another mode in which subjection to Hand originates, is a sacrifice in which they use a cake of spelt, whence the ceremony derives its name, and various other acts and things are done and made in the solemnization of this disposition with a traditional form of words, in the presence of ten witnesses: and this ceremony is still in use, for the functions of the greater flamens, that is, the flamens of Jove, of Mars, of Quirinus, and the duties of the ritual king, can only be performed by persons born in marriage solemnized by confarreation.

§ 113. *Coemptione in m*anu*m* conv*eniunt* per mancipatione*m, id est* per quandam imaginariam venditionem, *adh*ibitis non m*inus* quam v. testibus, civibus Romanis puberibus, item libripend*e, asse is sibi emit* mulierem, cuius in manum convenit.

§ 113. In coemption the right of Hand over a woman is vested in a person to whom she is conveyed by a mancipation or imaginary sale in the presence of at least five witnesses, citizens of Rome above the age of puberty, besides a balance holder, for an As or ingot of bronze.

§ 114. Potest autem coemptio-

§ 114. By coemption a woman

nem facere mulier non solum cum marito suo, sed etiam cum extraneo: *unde* aut matrimonii causa facta coemptio dicitur, aut fiduciae causa. *quae* enim cum marito suo facit coemptionem, *ut* aput eum filiae loco sit, dicitur matrimonii causa fecisse coemptionem: quae vero alterius rei causa facit coemptionem *cum* viro *suo aut* cum extraneo, velut tutelae evitandae causa, dicitur fiduciae causa fecisse coemptionem.

may convey herself either to a husband or to a stranger, and accordingly there are two forms of coemption, matrimonial and fiduciary. A coemption with a husband in order to acquire the status of daughter in his house is a matrimonial coemption: a coemption for another purpose, whether with a husband or with a stranger, for liberation, for instance, from guardianship, is a fiduciary coemption.

§ 115. Quod est tale: si qua velit quos habe*t* tutores reponere, ut alium nanciscatur, ii*s auctori*bus coemptionem facit; deinde a coemptionatore remancipata ei cui ipsa velit, et ab eo vindicta manumissa, incipit eum habere tu*t*orem, *a* quo manumissa est: qui tutor fiduciarius dicitur, sicut inferius appare*b*it.

§ 115. This is accomplished by the following process: the woman who desires to set aside her present guardians and substitute another makes a coemption of herself to some one with their sanction: thereupon the party to this coemption remancipates her to the person intended to be substituted as guardian, and this person manumits her by fictitious vindication, and in virtue of this manumission becomes her guardian, being called a fiduciary guardian, as will hereafter be explained.

§ 115 *a*. Olim etiam testamenti faciendi gratia *f*iduciari*a* fiebat coemptio. tunc enim non aliter feminae testamenti faciendi ius habebant, exceptis qui*bus*dam personis, quam si coemptionem fecisse*nt re*mancipataeque *et* manumissae fuissent. set hanc nece*ssitatem* coemptionis fac*iendae* ex auctoritate divi Hadriani senatus remisit .... femina ....

§ 115 *a*. In former times testamentary capacity was acquired by fiduciary coemption, for no woman was competent to dispose of her property by will, with the exception of certain persons, unless she had made a coemption, been remancipated, and then manumitted: but this necessity of coemption was abolished by a senatusconsult made on the motion of Hadrian.

§ 115 *b*. *Licet autem mulier* fid*u*ciae causa *cum viro suo f*ece*rit co*emp*tionem*, nihilominus filiae loco incipit esse: nam si omnino qualibet ex causa u*x*or in manu vi*r*i *sit*, pl*acuit* eam *iura* filiae nancisci.

§ 115 *b*. Even if a woman makes only a fiduciary coemption with her husband, she acquires the status of his daughter, for it is held that from whatever cause a woman is in the hand of her husband, she acquires the position of his daughter.

Marital power (manus) was entirely assimilated to patria potestas. By manus the husband had power of life and death over the wife, Livy, 39, 18; Tac. Ann. 13, 32; and all the property of the wife,

even more absolutely than by the common law of English jurisprudence, vested in the husband, 2 § 98.

Manus was perhaps originally an essential accompaniment of civil wedlock, and the patriarchs of the Roman nation could probably not conceive of the conjugal union as disjoined from manus. Yet at a very early period of Roman history these elements of marriage were recognized as separable, and in later times they were almost universally dissociated, and wedlock was unaccompanied by manus. In a marriage celebrated without confarreation and without coemption, before the expiration of the first year of cohabitation, there was civil wedlock without manus, and the Twelve Tables provided a method (trinoctio abesse) by which this state could be indefinitely prolonged: a filiusfamilias was capable of civil wedlock, but had no manus, for marital power, like every other civil right, passed out of the dependent husband to vest in the father; and as soon as gentile marriages were recognized by the legislator the Romans were still more familiarized with the spectacle of lawful matrimony without manus. As the ages advanced the wife acquired more and more independence; manus was almost obsolete in the time of Gaius, and it has quite vanished from the legislation of Justinian.

Confarreation was a form of marriage which made the issue eligible for certain high sacerdotal functions, and may therefore be regarded as characteristic of the patrician caste. Originally it probably produced marital power in its full extent; but when Augustus, B.C. 10, after a vacancy of seventy-five years, renewed the priesthood of Jove (flaminium diale) he limited by statute the legal effect of confarreation in that particular instance, § 136; and Tiberius, A.D. 23, extended the limitation to all future cases of confarreation. Henceforth it only operated a change of family in respect of sacred rites (sacra): the woman ceased to have the domestic gods and domestic worship of her father, and took in exchange the domestic gods and domestic worship of her husband. But in secular matters her family was unchanged: she remained, if filiafamilias, subject to patria potestas, and did not become quasi filiafamilias in the household of her husband: her old ties of agnation in her father's family were not snapped, and no new ties of agnation in her husband's family were acquired. Divorce (diffarreatio) was almost impossible, and this indissolubility of the connection contributed to the unpopularity of confarreatio. Moreover, it was a religious ceremonial, requiring the presence of the pontifex maximus and flamen

dialis, and as such it vanished with vanishing paganism. The ten witnesses apparently represented the ten curiae of which the tribe was composed, or the ten gentes of which the curia was composed, or, if the decimal division continued further, the ten families of which the gens was composed.

The exact nature of Coemption, in consequence of the defective state of the Veronese manuscript, must remain a mystery. Coemption was a form of mancipation, § 113, but in virtue of the provision of the Twelve Tables, Cum nexum faxit mancipiumque, uti lingua nuncupassit, ita jus esto, the nature of every mancipation depended on the mancipii lex, the accompanying nuncupation or verbal declaration of its conditions, intentions, purposes; as in English conveyancing the nature of a grant is limited and determined by the habendum and tenendum of the deed. We are informed that in coemption the formula was not the same as in other mancipations, § 123, but we are not informed what it was. Even in Cicero's time many advocates were ignorant of the legal effect of a coemption because they were ignorant of the precise terms of the formula in which it was concluded, De Orat. 1, 56. The word itself may suggest a conjecture that it was a conveyance of the husband to the wife as well as of the wife to the husband; and this is supported by Servius on Georgics, 1, 34, and Isidorus, 5, 24, no great authorities, but who quoted apparently from Ulpian: Antiquus nuptiarum erat ritus, quo se maritus et uxor invicem emebant, ne videretur ancilla uxor, 'An ancient nuptial form wherein husband and wife made a mutual purchase, to bar the inference that the wife became a slave.' Plutarch informs us that the wife asserted her equality by the terms, Ubi tu Caius, ego Caia, Quaest. Rom. 28: 'Where thou art master, I am mistress.' Boethius on Cicero Topica, 3, 14, quoting from Ulpian, says: Sese in coemendo invicem interrogabant, vir ita: an sibi mulier materfamilias esse vellet? illa respondebat velle. Item mulier interrogabat, an vir sibi paterfamilias esse vellet? ille respondebat velle. Itaque mulier viri conveniebat in manum, et erat mulier materfamilias viro, loco filiae. 'The man and woman interrogated one another. He asked her if she wished to be mother of his household; she answered, Yes. She asked him if he wished to be father of her household; he answered, Yes. And thus the woman passed into the Hand of the man, and was called the mother of his household, with the status of filiafamilias.' According to Cicero, the wife

was only called materfamilias when subject to Hand: Genus est uxor, ejus duae formae, una matrumfamilias, quae in manum convenerant, altera earum quae tantummodo uxores habentur, Top. 4. Gellius says the same: Idonei vocum antiquarum enarratores tradiderunt . . . . matremfamilias appellatam esse eam solam quae in mariti manu mancipioque, aut in ejus in cujus maritus manu mancipioque esset, quoniam non in matrimonium tantum sed in familiam quoque mariti et in sui heredis locum venisset, Gellius, 18, 6. 'Competent interpreters of the ancient language say that materfamilias was a title only given to a wife in the hand and mancipation of her husband, or of the person who held her husband in hand and mancipation, as she was not only a wife, but a member of the family of the husband, having acquired therein the status of self-successor.' Boethius further limits the title to a wife who has become subject to manus by coemption: Quae autem in manum per coemptionem convenerant, hae matresfamilias vocabantur, quae vero usu et farreatione minime, ibid. However this may have been, in one sense the name was a misnomer, for a wife subject to hand was not sui juris (materfamilias), but alieni juris (filiafamilias): and that materfamilias denoted a woman sui juris, whether married or unmarried, as opposed to a filiafamilias or woman alieni juris, appears from Ulpian: Sui juris sunt familiarum suarum principes, id est paterfamilias itemque materfamilias, 4, 6.

If the wife was subject to the power of her father she required his consent (auctoritas) before she could make a coemption with her husband: Secundo capite legis Juliae de adulteriis permittitur patri si in filia sua quam in potestate habet, aut in ea quae eo auctore, cum in potestate esset, viro in manum convenerit, adulterum domi suae generive sui deprehenderit, isque in eam rem socerum adhibuerit, ut is pater eum adulterum sine fraude sua occidat, ita ut filiam in continenti occidat, Collatio, 4, 22. 'The second section of the lex Julia on adultery permits a father who finds his daughter, who is in his power or with his consent in the hand of her husband, committing adultery in his house or in the house of her husband, if called in for the purpose by his son-in-law, to kill the adulterer with impunity, provided that at the same time he also puts his daughter to death.' If the wife was independent of parental control, she required the sanction of her guardians, that is, her agnates, before she could make a coemption with her husband: In manum convenerat usu an coemptione? Usu non potuit, nihil enim potest

de tutela legitima nisi omnium tutorum auctoritate deminui. Coemptione? omnibus ergo auctoribus, Cic. Pro Flacco, 34. 'Had the wife become subject to marital power by cohabitation or by coemption? Certainly not by either, for the rights of agnatic guardians cannot be defeated without the concurrence of all the guardians.'

Coemption was sometimes employed for other purposes than matrimony, and was then called fiduciary coemption. Sometimes the intention was to extinguish the obligation of onerous sacred rites attached to the estate of an heiress: Jure consultorum ingenio senes ad coemptiones faciendas interimendorum sacrorum causa reperti sunt, Cic. Pro Murena, 12. 'Juristic ingenuity invented coemptions with aged men for extinguishing sacred rites.' Savigny gives the following conjectural explanation of the process. The obligation to the sacra belonged to the Quiritary ownership of the universitas of the woman's estate. This, by the effect of coemption, vested in the coemptionator, an old man approaching dissolution (senex coemptionalis), with whom a fictitious marriage was contracted, and who took the estate as universal successor. He forthwith dismissed the woman from his manus by remancipation and manumission: and then, according to covenant, restored to her the estate in portions; that is, released from the ritual obligations, which only attached to the universitas. On his death, as Quiritary owner of the empty universitas, the obligation to the rites was extinguished: for the succession (hereditas) to the coemptionator did not pass to the woman, as she by remancipation had ceased to be [such was the hypothesis of Savigny before the discovery of Gaius: instructed by Gaius we must rather say, as mere fiduciary coemption had not the effect of making her] his filiafamilias and sua heres. In Plautus, Bacchides, 4, 8, 52, and Cicero ad diversos: Sum enim χρήσει μὲν tuus, κτήσει δὲ Attici nostri. Ergo fructus est tuus, mancipium illius; quod quidem si inter senes coemptionales proscripserit, egerit non multum, 7, 29: the phrase senex coemptionalis denotes a slave. From which it may be inferred that a slave, useless for any other purpose, and therefore very cheap, was sometimes bought and manumitted to serve as coemptionator. In such a case the whole transaction would be very inexpensive, if not very decorous. This mode of getting rid of sacred rites is compared by Ihering, § 58, with the institution of a slave as successor to bear the infamy of bankruptcy instead of a bankrupt

testator, 2 § 154. Universal succession was an institution which Roman law only admitted in certain cases: as operated by contract it was only admitted in case of Manus and Adoptio. If universal succession was required for the purpose of extinguishing the obligation to sacred rites attaching to the estate of an heiress, we might have supposed that Adrogatio would have been a less offensive mockery than a fictitious marriage (fiduciary coemption); adrogatio, however, was inapplicable, because, as we have seen, up to a late period of Roman law women were incapable of being adrogated. Moreover, the Pontifices, who had a veto on adrogations, were not likely to lend themselves readily to the extinction of sacred rites.

At other times Coemption was employed to enable a woman to select a guardian, § 195. Nam quum permulta praeclare legibus essent constituta, ea jureconsultorum ingeniis pleraque corrupta ac depravata sunt. Mulieres omnes propter infirmitatem consilii majores in tutorum potestate esse voluerunt: hi invenerunt genera tutorum quae potestate mulierum continerentur, Cic. Pro Murena, 12. 'There are many wise legal provisions that juristic ingenuity has defeated and perverted. All women on account of their weakness of judgment were placed by our ancestors under a guardian's control: jurists invented a kind of guardian subject to female dictation.'

The latest employment of Coemption enabled a woman to break the ties of agnation and thus acquire testamentary capacity, § 115 *a*. The coemptionator (party to the coemption) in virtue of the manus thereby acquired was able, and by a fiducia or trust was bound, to sell the woman into bondage as if she were filia familias: accordingly he remancipated her to a third person, who by manumitting her in accordance with another fiducia became her patron, and as patron, in accordance with the Twelve Tables, § 165, her statutory guardian, and, as having acted under a fiducia, her fiduciary guardian, § 115. It may occur to us that as coemptio required the sanction of a father or guardian, this process could not be of much use in getting rid of a guardian or defeating the claims of agnatic guardians to a woman's intestate succession; but it must be remembered that the nearest agnate, who alone was heir and guardian, was a variable person, and that a given nearest agnate might be not indisposed to allow a woman to acquire the free disposition of her property and to defeat the claims of those who, after his death, would be nearest agnates and presumptive heirs. At all

events, however indisposed the guardian might be to such a course, a period at last arrived when the auctoritas of the agnatic guardian, though still required as a formality, could be extorted, if not yielded voluntarily, by appeal to the magistrate, § 195.

Agnatic guardianship of female wards was abolished by a lex Claudia, § 171, and thus the woman would be free from the control of an interested guardian in the disposition of her property during her lifetime. She would still however be a mere usufructuary or tenant for life, being devoid of the power of testation. For when wills could be only executed in the comitia, 2 § 101, she would be excluded from testation, as well as from adrogation, p. 90, by exclusion from the comitia: and after the introduction of the mancipatory will she was still deprived of testamentifactio by her agnates' indefeasible claims to her reversion. Agnation itself, however, was defeasible by means of coemptio and remancipatio and the consequent capitis minutio; and when the auctoritas of the agnates for these proceedings could be extorted, § 195, the woman had practically acquired power of testation, although its exercise was hampered by a tedious formality, which was not abolished by the emperor Claudius when he abolished agnatic guardianship. It was not till the senatusconsult of Hadrian that the rupture of the ties of agnation by means of coemptio ceased to be necessary to the validity of a woman's will, § 115 *a*; though, as already suggested, it had probably been a mere formality (the woman having power to extort at pleasure the auctoritas of the agnatic guardian) long before the time of Claudius.

Ihering, § 29, explains why capitis minutio was deemed to be a title that conferred upon a woman a right to make a will, a phenomenon that certainly requires explanation, by supposing that the rule was at first adopted in the interest of a married woman's original family and gens. A woman, who after marriage and subjection to manus and consequent change of family had by the death of her husband become sui juris, would, by dying intestate, leave her property to be inherited by the members of her new family; that is by her husband's agnates and gentiles. Accordingly the power of making a will was given, in the first instance, to the genuine widow in the interest of her original agnates, to enable her to divert the devolution of her property from the members of her husband's family and gens to the members of the family and gens of her father. Afterwards, when this exceptional privilege of

married women had once been recognized, simulated or fictitious marriage (coemptio) was employed as an artifice for giving testamentifactio even to unmarried women, and certainly not in the interest of their agnates.

The origination of Manus by length of continuous possession (usus), i.e. by usucapio, shows plainly enough that early Roman law regarded the wife as a mere chattel of the husband. The law of the Twelve Tables allowed the wife to bar this usucapion by an absence for three whole nights in each year. A movable day consists of 24 hours measured from any given moment. A calendar day consists of 24 hours measured from midnight to midnight. A year consists of 365 days; a movable year begins on any given day, a calendar year on the 1st January. The wife's interruption of the husband's usucapio seems a fitting occasion for some explanation of the different modes of measuring time in Roman jurisprudence.

There were three modes of computing a movable year.

(1) Computatio naturalis. A year beginning at a certain hour of a certain day of a certain month ends at the same hour of the same day of the same month when they next recur on the calendar. Thus a year beginning at 11 a.m. 1 Jan. 1800 is completed at 11 a.m. 1 Jan. 1801. This mode of computation is said to be ad momenta, by moments (computatio a momento ad momentum), where momenta as opposed to dies means hours, minutes, seconds, i.e. any subdivisions of the day. This mode of computation, requiring exact chronometric instruments, is quite exceptional in Roman law, and is only expressly applied to the determination of Majority or the age of 25 years, D. 4, 4, 3, 3. Thus a man born 11 a.m. 1 Jan. 1800 attains his majority at 11 a.m, 1 Jan. 1825, and if he makes any contract at 10 a.m. of that morning is entitled to restitution as a minor. Savigny supposes that the same rule would be applied in determining the limits of tutela and curatela.

Computatio civilis. The imperfection of chronometric instruments caused the subdivisions of the day to be neglected in ordinary legal computations and only whole days to be counted: in other words the jurist only regarded calendar days, 24 hours from midnight to midnight, not movable days, 24 hours beginning and ending at any moment. Accordingly the first day of the year was always assumed to have begun at the first moment of the calendar day, but the treatment of the last day varied.

(2) It was either considered as completed the moment after it

began: thus a year of 365 days beginning at any moment of 1 Jan. is completed a moment after the midnight which separates Dec. 30 from Dec. 31. This computation was employed when a right was to be acquired on the expiration of a certain term.

(3) Or the last day was not counted at all until its actual termination, so that the year beginning at any hour of 1 Jan. is not completed till the midnight which separates 31 Dec. from 1 Jan. This mode was employed when a right was to be lost on the expiration of a certain term.

If a right was to be acquired on the expiration of a certain period, it was acquired as soon as the last day of the period began; for instance, if the period was a year, the right was acquired immediately after midnight of the 364th day. This applied to acquisition of ownership by usucapion, Dig. 44, 3, 15, and Dig. 41, 3, 6; acquisition of testamentary capacity by attaining to years of puberty, Dig. 28, 1, 5; acquisition of manumissive capacity, Dig. 40, 1, 1; acquisition by a Latin of the franchise by bringing up a yearling (anniculus) issue of a lawful marriage, Dig. 50, 16, 132. Anniculus trecentesimo sexagesimo quinto die dicitur, incipiente plane, non exacto die, quia annum civiliter non ad momenta temporum sed ad dies numeramus, Dig. 50, 16, 134. 'A child is said to be a yearling on its 365th day, at the beginning, not at the close of the day; for civil computation of the year does not recognize the minor subdivision into minutes or hours, but only reckons by whole days.'

When, on the contrary, a right was forfeited or extinguished by lapse of a certain period, as in the loss of a right of action under a statute of limitations, Dig. 44, 7, 6, the period was not completed until the last day was ended.

Such is Vangerow's doctrine, § 196. So deficient, however, in precision is the Latin language when it attempts to define periods of time, that Savigny, with the same passages before him, makes the civil year one day longer, both when a right is acquired and when a right is extinguished; that is, he makes the first of the 365 days which compose the year to be the day after the day on which occurs the event that forms the starting point of the year; whereas Vangerow includes within the year the day on which the limiting event occurred. Thus Savigny would make an annual usucapion beginning 1 Jan. end a moment after the midnight separating 31 Dec. from the next 1 Jan., and the prescription of a right of action commencing to run from a 1 Jan.

end on the midnight separating a subsequent 1 Jan. from 2 Jan. According to Savigny, then, the year by computatio naturalis will be a mean between the years by the two modes of computatio civilis; whereas, according to Vangerow, even the longer civil year is shorter than the natural year. In other words, Savigny's year of 365 days is exclusive of the day containing the starting point, while Vangerow's is inclusive. It is true that the Romans used both methods of computation (inclusive and exclusive) even in legal documents: and, for instance, Julius Caesar, in the edict establishing the Julian calendar, intending every period of four years to be increased by an intercalary day, directed, ut quarto quoque anno unum intercalarent diem, meaning every fourth year exclusive of the last leap year: but the Pontifices interpreted the direction to mean every fourth year including the last leap year, and in preparing the annual calendars left only two ordinary years between two successive leap years instead of three, an error which was continued for 36 years before it was discovered and rectified. But the inclusive computation was used in naming the days of the calendar (tertio ante calendas, quarto ante calendas, &c.), and was apparently the older and commoner mode of reckoning; and Vangerow is probably right in supposing it was always employed in the civilis computatio of years.

Returning now to the interruption (usurpatio) of usucapio, we shall find from the following passage of Gellius that the vesting of manus by cohabitation was regarded as a loss of independence by the wife, not as an acquisition of power by the husband, for the latter computation was employed. Q. quoque Mucium jure consultum dicere solitum legi, lege non isse usurpatum mulierem, quae, quum kalendis Januariis apud virum matrimonii causa esse coepisset, ante diem quartum kalendas Januarias sequentes usurpatum isset: non enim posse impleri trinoctium, quod abesse a viro usurpandi causa ex duodecim tabulis deberet, quoniam tertiae noctis posteriores sex horae alterius anni essent qui inciperet ex kalendis, 3, 2. 'I have read that, according to Quintus Mucius, the statutory requirements for the interruption of usucapion are not satisfied if a woman married on the 1st of January and did not leave her husband's house until the 29th of December, as she could not then be absent for three whole nights before the end of the year, the interval required by the Twelve Tables, because the last six hours of the third night belong to the first day of the following year.' This implies that the

year of cohabitation was not completed before midnight of the 31st of December, and that the wife could satisfy the law by leaving before midnight on the 28th. If the vesting of manus had been regarded as an acquisition of a right by the husband, the year would have been complete immediately after midnight of December 30, and the wife could not have accomplished a sufficient interruption of possession (usurpatio) unless she left her husband's house before nightfall on the 27th. If we adopted Savigny's view of the duration of the year, we, of course, must interpret the termination of the year at the midnight separating the 31st December from 1st of January, instead of at the midnight separating 1st January from 2nd January, as being, on the contrary, a proof that the vesting of manus by cohabitation was regarded as an acquisition of power by the husband, not as a loss of independence by the wife.

§ 114. Fiducia was a declaration of the conditions, purposes, and trusts of a mancipation. Besides its use in coemption, it was employed, as we shall see presently, in emancipation and adoption, and was the earliest form of constituting the contracts of deposit and mortgage, 2, § 59.

Fiducia must not be identified with nuncupatio. Nuncupatio forms an integral part of Mancipatio, and with it is a title of civil law, and ground to support an actio stricti juris. Fiducia never coalesces with Mancipatio, but remains a separate adjunct, forming a title of Gentile law, and ground to support a bonae fidei actio. Herein Mancipatio is contrasted with Tradition and the dispositions of natural law. Conventions accompanying Tradition unite with it, and form a single consolidated disposition; and the pacts annexed (pacta adjecta) to any contract of natural law (venditio, conductio, mandatum, &c.) become integral parts thereof, and are enforced by the action brought on the principal contract. Stipulatio, as a civil disposition, seems to have originally resembled Mancipation in this respect: at least it was a late period of the law when the rule was clearly established that: Pacta incontinenti facta stipulationi inesse creduntur, D. 12, 1, 40, i. e. Pacts contemporaneous with a stipulation are deemed to be portions of the stipulation or to have acquired the efficacy of stipulations. Savigny § 268.

DE MANCIPIO.

§ 116. Superest ut exponamus quae personae in mancipio sint.

§ 117. Omnes igitur liberorum personae, *sive* masculi*ni sive* femi*nini sexus*, *quae* in potestate parentis sunt, mancipari ab hoc eodem modo possunt, quo etiam servi mancipari possunt.

§ 118. Idem iuris est in earum personis quae in manu sunt. nam feminae a coemptionatoribus eodem modo possunt *mancipari quo liberi a parente mancipantur; adeo* quidem, *ut quam*vis *ea* so*la* aput coemptionatorem f*i*liae loco sit *quae ei* nupta sit, *tamen* nihilo minus etiam quae ei nup*ta* non *sit*, nec ob id filiae loco sit, ab eo mancipari possit.

§ 118 *a*. Plerumque solum et a parentibus et a coemptionatoribus mancipantur, cum velint parentes coemptionatoresque *e* suo iure eas personas dimittere, sicut inferius evidentius apparebit.

§ 119. Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio: quod et ipsum ius proprium civium Romanorum est. eaque res ita agitur. adhibitis non minus qu*am* quinque testibus civibus Romanis puberibus, et praeterea alio eiusdem condicionis qui libram aeneam teneat, qui appellatur libripens, is qu*i* mancipio accipit rem, *aes* tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO, ISQUE MIHI EMPTUS EST HOC AERE AENEAQUE LIBRA: deinde aere percutit libram, idque aes dat ei a quo mancipio accipit, quasi pretii loco.

§ 116. It remains to examine what it is to be held in mancipation.

§ 117. All children, male or female, in the power of their father are liable to be mancipated by their father just as his slaves may be mancipated.

§ 118. A woman in the hand is subject to the same mode of alienation, and may be mancipated by the person who has acquired her by coemption just as a child may be mancipated by its father: and although the acquirer by coemption has not the power of a father over her unless he is her husband, nevertheless, even when he is not her husband, and therefore has not the status of a father, he can dispose of her by mancipation.

§ 118 *a*. Almost the sole occasion of mancipation by a parent or acquirer by coemption is when the parent or acquirer by coemption designs to liberate the person mancipated from his lawful control, as will presently be more fully explained.

§ 119. Mancipation, as before stated, is an imaginary sale which is only within the competence of Roman citizens, and consists in the following process: in the presence of not fewer than five witnesses, citizens of Rome above the age of puberty, and another person of the same condition, who holds a bronze balance in his hands and is called the balance holder, the alienee holding a bronze ingot in his hand, pronounces the following words: THIS MAN I CLAIM AS BELONGING TO ME BY RIGHT QUIRITARY AND BE HE (or, HE IS) PURCHASED TO ME BY THIS INGOT AND THIS SCALE OF BRONZE. He then strikes the scale with the ingot, which he delivers to

the mancipator as by way of purchase money.

§ 120. Eo modo et serviles et liberae personae mancipantur. animalia quoque quae mancipi sunt, quo in numero habentur boves, equi, muli, asini; item praedia tam urbana quam rustica quae et ipsa mancipi sunt, qualia sunt Italica, eodem modo solent mancipari.

§ 120. By this formality both slaves and free persons may be mancipated, and also such animals as are mancipable, namely, oxen, horses, mules, and asses: immovables also, urban and rustic, if subject to quiritary dominion, such as Italic lands and houses, are aliened by the same outward form.

§ 121. In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae serviles et liberae, item animalia quae mancipi sunt, nisi in praesentia sint, mancipari non possunt: adeo quidem, ut eum *qui* mancipio accipit adprehendere id ipsum quod ei mancipio datur necesse sit: unde etiam mancipatio dicitur, quia manu res capitur. praedia vero absentia solent mancipari.

§ 121. The only point wherein the mancipation of immovables differs from the mancipation of movables is this, that persons, whether slaves or free, and animals that are mancipable, must be present to be mancipated: indeed the alienee must grasp the movable to be conveyed with his hand, and from this manual prehension the name of mancipation is derived; whereas immovables need not be present to be mancipated.

§ 122. Ideo autem aes et libra adhibetur, quia olim aereis tantum nummis utebantur; et erant asses, dupondii, semi*sses et* quad*ran*tes, nec ullus aureus vel argenteus *nummus in* usu erat, sicut ex lege XII tabularum intellegere possumus; eorumque nummorum vis et potes*tas* non in numero erat, sed in pondere n*ummorum*. *ve*luti asses librales erant, et dipondii *tum* erant *bilibres; unde etiam* dipondius dictus *est quasi duo* pond*o*: *quod* nomen adhuc in usu retinetur. semiss*es quoque* et quadrante*s* pro rata scilicet portione *l*ibr*ae aeris habe*b*ant certum pondus*. *item* qui daba*nt olim pecuniam non ad*numeraba*nt* eam, sed a*pp*endeba*nt*. unde servi quibus perm*ittitur* a*d*minis*t*ratio *pecuniae* d*ispensatores* appellati sunt et ad*huc appellan*tur.

§ 122. The reason of using a bronze ingot and a weighing scale is the fact that the ancient currency consisted entirely of bronze ingots, the as, the double as, the half as, the quarter as, and there was no gold or silver in circulation, as appears by the law of the Twelve Tables: and the value of the currency was not measured by number of coins but by weight of metal. Thus the as was a pound of bronze, the double as two pounds, whence its name (dupondius), which still survives; the half as and quarter as those respective fractions of a pound. Accordingly, money payments were not made by counting, but by weighing, whence slaves entrusted with pecuniary transactions are still called dispensators.

§ 123. Si tamen quaerat ali*quis*, *qua*re a coemptio*ne differat mancipatio*, ea quidem quae coemptionem faci*t*, *non deducitur in* servilem con-

§ 123. If it is asked in what respect coemptive conveyance differs from mancipation, the answer is this, that coemption does not re-

dicionem, a *parentibus vero et a coemptionatoribus* mancipa*ti* mancipataeve servorum loco constituuntur, adeo quidem, ut ab eo cuius in mancipio sunt neque hereditate*m* neque legata aliter capere po*ssint*, quam *si* simul eodem testamento liberi esse iubeantur sicuti iuris est in persona servorum. sed differentiae ratio manifest*a est*, cum a parentibus et a coemptionatoribus *ii*sdem verbis mancipio accipiuntur quibus servi; quod non similiter *fit* in *coemptione*.

duce to a servile condition, whereas mancipation reduces to so completely a servile condition that a person held in mancipation cannot take as heir or legatee under the will of the person to whom he is mancipated, unless thereby at the same time enfranchised, thus labouring under the same incapacity as a slave: the reason too of the difference is plain, as the form of words employed in mancipation by a parent or previous acquirer by coemption is identical with that used in the mancipation of slaves, but it is not so in coemptive conveyance.

In what respects did domestic bondage (mancipium or mancipii causa) differ from slavery (servitus)? Bondage was an institute of Civil law, slavery an institute of the law of nations, § 52. Bondage was the result of mancipation by a parent or coemptionator, and only a Roman citizen was capable of becoming a bondsman. The proprietor has possession of the slave, the lord has no possession of the bondsman, 2, § 90. The bondsman was civis Romanus, though what became of his political capacities during his bondage is uncertain; and he was liber, though alieni juris: he was free in respect of the rest of the world, he was only a bondsman in respect of his domestic superior (paterfamilias). Hence the status of mancipium was relative; a man could only be mancipium in relation to a given domestic lord: whereas the status of slavery was absolute; a man might be a slave without a proprietor (servus sine domino): for instance, a person condemned for a capital crime, who was called the slave of punishment (servus poenae, Inst. 1, 12, 3), or a slave abandoned (derelictus) by his proprietor. Accordingly, falling into servitus was maxima capitis diminutio, while falling into mancipii causa was minima capitis diminutio, § 162. The bondsman had no proprietary rights against his superior, 2, § 86, but he had some of the Primordial rights; for instance, he could sue his superior for outrage, § 141; and he was capable of civil wedlock and could beget Roman citizens, though during his bondage his patria potestas was in abeyance, § 135 *a*. Release from bondage, as from slavery, was by manumission, and the manumitter became the patron of the released person, § 195, but the manumitted

bondsman became ingenuus, whereas the manumitted slave became libertinus. Bondage did not exist in the time of Justinian.

§ 119. The libripens must not be dumb, Ulpian, 20, 7: probably because he had to utter the formula preserved by Festus, Raudusculo libram ferito, i.e. to invite the emptor to strike the scale with the ingot, in order to show by the ring that the metal was genuine. Ihering, § 46.

§ 120. Under the first emperors the body of the Roman world consisted of three members, the imperial city, Rome, Italy, and the provinces, the two former being highly privileged in comparison with the third. After the Social War all Italy had acquired the Roman franchise, but Italic soil was not a purely local appellation, as jus Italicum was conceded to many provincial cities. Jus Italicum, or Italian privileges, implied (1) a free municipal constitution with elective magistrates (generally called duumviri juri dicundo) possessed of independent jurisdiction; and, what was still more important, (2) immunity from direct taxation, whether in the form of capitation tax (tributum capitis), imposed on all who were not holders of land (tributarii), or in the form of land tax (tributum agri), imposed on holders of land (possessores), and paid in provinces of the people to the aerarium under the name of stipendium, in provinces of the emperor to the fiscus under the name of tributum, 2, § 21. Italic soil was (3) subject to Quiritary ownership (dominium ex jure Quiritium) and acquirable and transferable by usucapion and mancipation. Under the later emperors, as early as the time of Diocletian, the Roman world was equalized, not by the elevation of the depressed members, but by depression of those formerly favoured: Italy was shorn of her privileges, and all the empire became provincial.

§ 122. Chemical analysis shows that the aes of which Roman coins consisted was bronze, a mixture of copper (cuprum), tin, and lead. Brass, a mixture of copper and calamine (cadmeia) or zinc, was called orichalcum. Silver currency was first introduced B.C. 269.

§ 123. As coemptio was a form of mancipatio, how does it happen that manus, the result of coemptio, differs from mancipium, the result of mancipatio? Because, Gaius answers, the formula of words used in the mancipatio that entered into coemptio was specifically different from the formula employed on other occasions of mancipation.

QUIBUS MODIS IUS POTESTATIS SOLVATUR.

§ 124. Videamus nunc, quib*us* *modis ii qui a*lieno iur*i subi*ecti sunt eo iure liberentur.

§ 125. *Ac* pri*us* de his dispiciamus qui in potestate sunt.

§ 126. Et quidem *servi quem*admodum *potestate liberentur, ex his intellege*re possumus quae de servis manum*ittendis su*perius *ex*posuimus.

§ 127. Hi vero qui *in potestate parentis sunt mortuo eo sui iuris fiunt. Sed hoc d*istinctionem recipit. nam *mortuo patre sane* omnimodo filii filiaeve sui iuris efficiun*tur.* mortuo vero av*o non omnimodo nepotes neptesque* sui *iuris fiunt, sed ita, si post mortem avi* in patris sui potestatem recasuri non *sunt. ita*que si *moriente avo pater eorum et vivat et in potestate* patris fuerit, tunc post *obitum avi* in potestate pat*ris sui fiunt: si vero is,* quo tempore av*us* moritur, *aut iam mortuus est, aut exiit de potestate patris, tunc hi, quia* in potestatem eius cadere non possunt, sui iuris fiunt.

§ 128. Cum autem is cui ob aliquod maleficium ex lege poenali aqua et igni interdicitur civitatem Romanam amitt*a*t, sequitur, ut qui eo modo ex numero civium Romanorum tollitur, proinde ac mortuo eo desinant liberi in potestate eius esse: nec enim ratio patitur, ut peregrinae condicionis homo civem Romanum in potestate habeat. Pari ratione et si ei qui in potestate parentis sit aqua et igni interdictum fuerit, desinit in potestate parentis esse, quia aeque ratio non patitur, ut peregrinae condicionis homo in potestate sit civis Romani parentis.

§ 124. Let us now examine the modes whereby persons dependent on a superior are freed from their dependence.

§ 125. And, first, let us consider persons subject to power.

§ 126. The mode of liberating slaves from their proprietor's power was expounded above, when we treated of servile manumission.

§ 127. Children under paternal power become independent at the parent's death, subject, however, to this reservation: the death of a father always releases his sons and daughters from dependence: the death of a grandfather only releases his grandchildren from dependence, provided that it does not subject them to the power of their father: for if at the death of the grandfather the father is alive and in his power, the grandchildren, after the grandfather's death, are in the power of the father; but if at the time of the grandfather's death the father is dead or not subject to the grandfather, the grandchildren will not fall under his power, but become independent.

§ 128. As interdiction from fire and water for an offence against the criminal code involves loss of citizenship, such removal of a man from the list of Roman citizens operates, like his death, to liberate his children from his power, for it is inconsistent with civil law that an alien should exercise parental power over a citizen of Rome: conversely, the interdiction from fire and water of a person subject to parental power terminates the power of the parent, because it is a similar inconsistency that a person of alien status should be subject to the parental power of a Roman citizen.

§ 129. Quod si ab hostibus captus fuerit parens, quamvis ser*vus inter*im hostium fiat, pendet ius liberorum propter ius postliminii, q*uia* hi qui ab hostibus capti sunt, si reversi fuerint, omn*ia* pristina iura recipiunt. itaque reversus habebit liberos in potestate. si vero illic mortuus sit, erunt quidem liberi sui iuris; sed utrum ex hoc tempore quo mortuus est aput hostes parens, an ex illo quo ab ho*st*ibus captus est, dubitari potest. Ipse quoque filius neposve si ab hostibus captus fuerit, similiter dic*e*mus propter ius postliminii potestatem quoque parentis in suspenso esse.

§ 129. Though the hostile capture of the parent makes him a slave of the enemy, the status of his children is suspended by his right of retrospective rehabilitation, for on escape from captivity a man recovers all former rights: accordingly, if the father returns he will have his children in his power; if he dies in captivity his children will be independent, but whether their independence dates from the death of the parent or from his capture by the enemy may be disputed. Conversely, if a son or grandson is captured by the enemy, his right of subsequent recovery of status causes the power of his ascendent to be provisionally suspended.

§ 130. Praeterea exeunt liberi virilis sexus de patris potestate si flamines Diales inaugurentur, et feminini sexus si virgines Vestales capiantur.

§ 130. Further, a son is liberated from parental power by his inauguration as flamen of Jove, a daughter by her selection for the office of Vestal virgin.

§ 131. Olim quoque, quo tempore populus Romanus in Latinas regiones colonias deducebat, q*ui* *i*ussu parentis p*rofectus erat in Latinam coloniam*, e *patria potestate exire videbatur, cum qui ita civitate Romana* cesser*ant* *a*ccipe*rentur* alterius civitatis cives.

§ 131. Formerly, too, when Rome used to send colonies into the Latin territory, an order of the parent to depart for a Latin colony was held to liberate a son from parental power, because such departure was held to make the son a citizen of a foreign state.

§ 128. Relegation was a milder form of punishment than deportation, and involved no loss of civitas nor of domestic rights, Inst. 1, 12, 2.

§ 129. Postliminium is the recovery of rights by a person returned from captivity, or the recovery of rights over a person or thing recovered from hostile possession. The word postliminium seems to be derived from pot, the root of potestas or possessio, and limen or stlimen = ligamen, and therefore would denote the bridging over of the interval of captivity by a fiction of continued capacity or possession, as a doorway is bridged over by a lintel (limen).

§ 130. In imitation of the ancient law Justinian enacted that certain dignities should release from patria potestas; for instance, patriciatus and the episcopate, the latter because it made a man spiritual father of all mankind, Novella, 81.

§ 131. The Latini or members of coloniae Latinae were an intermediate class between cives and peregrini. They differed from peregrini in that they had commercium, i. e. capacity of Quiritary ownership with its incidents, and they differed from cives in not having connubium, and consequently being incapable of patria potestas, Cic. Pro Caecina, 35. A Roman citizen could only become a Latin with his own consent. Qui cives Romani in colonias Latinas proficiscebantur, fieri non poterant Latini ni erant auctores facti nomenque dederant, Cic. De Domo, 30. 'Roman citizens who went to Latin colonies did not lose their citizenship without voluntary enrolment among the colonists.' See also Cic. Pro Balbo, 11.

§ 132. Emancipatione *quoque desinunt liberi in potes*tatem *parentium esse. sed* filius quidem ter*tia demum mancipatione, ceteri* vero liberi, sive masculini sexus sive feminini, una mancipatione exeunt de parentium potestate: lex enim xii. tantum in persona filii de tribus mancipationibus loquitur, *his* verbis: SI PATER FILIUM *TER VENUMDABIT, FILIUS A PATRE* LIBER ESTO. *eaque* res ita agitur. mancipat pater filium alicui: is *e*um vindicta manu*mittit:* eo fact*o* revertitur in potestatem patris. is eum iterum mancipat vel eidem vel alii; *set in usu est ei*dem mancipari: isque *eum* postea simi*liter vindicta manumittit: quo facto rursus* in potestatem patris *sui* reverti*tur. tunc* tertio pater eum mancipat vel eidem vel alii; set hoc in usu est, ut eidem manci*petur: eaque* mancipati*one d*esini*t in potest*ate *patris esse, et*iamsi nondum manumissus sit, set adhuc in causa manci*pii* [*lin.* 24].

§ 132. Emancipation also liberates children from the power of the parent, a son being liberated by three mancipations, other issue, male or female, by a single mancipation; for the law of the Twelve Tables only mentions three mancipations in the case of the son, which it does in the following terms: IF A FATHER SELL A SON THREE TIMES, THE SON SHALL BE FREE FROM THE FATHER. The ceremony is as follows: the father mancipates his son to some one; the alienee manumits him by fictitious vindication, whereupon he reverts into the power of his father; the father again mancipates him to the same or a different alienee, usually to the same, who again manumits him by fictitious vindication, whereupon he reverts a second time into the power of his father; the father then mancipates him a third time to the same or a different alienee, usually to the same, and by this third mancipation the son ceases to be in the power of the father even before manumission and while in the status of a person held in mancipation. [The alienee or fiduciary father should then remancipate him to the natural father, in order that thereupon the natural father by manumitting him may acquire the rights of patron instead of the fiduciary father.]

§ 133. *Liberum autem arbitrium est ei qui filium et ex eo nepotem in potestate habebit, filium quidem potestate dimittere, nepotem vero in potestate retinere; vel ex diverso filium quidem in potestate retinere, nepotem vero manumittere; vel omnes sui iuris efficere. eadem et de pronepote dicta esse intellegemus.*

§ 134. *Praeterea parentes liberis in adoptionem datis in potestate eos habere desinunt; et in filio quidem,* si *in adoptionem datur, tres mancipationes* et *duae* intercedentes manumissiones proinde fiunt, ac fieri solent cum ita eum pater de potestate dimittit, ut sui iuris efficiatur. deinde aut patri remancipatur, et ab eo is qui adoptat vindicat aput praetorem filium suum esse, et illo contra non vin*di*cante *a* praetore vindicanti filius addicitur, aut *non* remancipatur patri, *sed ei qui adoptat in iure ceditur ab eo apud quem in tertia* mancipatione est: set sane commodius est patri remancipari. in ceteris vero liberorum personis, seu masculini seu feminini sexus, una scilicet mancipatio sufficit, et aut remancipantur parenti aut *non* remancipantur. Eadem et in provinciis aput praesidem provinciae solent fieri.

§ 133. A grandfather who has both a son, and by his son a grandson, in his power, may either release his son from his power and retain the grandson, or retain the son and manumit the grandson, or emancipate both son and grandson; and a great grandfather has a similar latitude of choice.

§ 134. A father is also divested of power over his children by giving them in adoption. To give a son in adoption, the first stage is three mancipations and two manumissions, as in emancipation; after this the son is either remancipated to the father, and by the adopter claimed as son from him by vindication before the praetor, and in default of counterclaim by the natural father is awarded by the praetor to the adoptive father as his son; or without remancipation to the natural father is directly claimed by the adoptive father by vindication from the alienee of the third mancipation (fiduciary father); but it is more convenient to interpose a remancipation to the natural father. In the case of other issue, male or female, a single mancipation suffices, with or without remancipation to the natural father. In the provinces a similar ceremony can be performed before the president of the province.

§ 135 *a*. Qui ex filio semel iterumve mancipato conceptus est, licet post tertiam mancipationem patris sui nascatur, tamen in avi potestate est, et ideo ab eo et *e*mancipari et in adoptionem dari potest. At is qui ex eo filio conceptus est qui in tertia mancipatione est, non nascitur in avi potestate. set eum Labeo quidem existimat in eiusdem mancipio esse cuius et pater sit. utimur autem hoc iure, ut quam diu pater eius in mancipio sit, pendeat ius eius: et si quidem pater eius ex mancipatione

§ 135 *a*. A grandson begotten after the first or second mancipation of the son, though born after the third mancipation, is subject to the power of the grandfather, and may by him be given in adoption or emancipated: a grandson begotten after the third mancipation is not born in the power of the grandfather, but, according to Labeo, is born in mancipation to the person to whom his father is mancipated. The rule, however, which has obtained acceptance is, that so

manumissus erit, cadit in eius potestatem; si vero is, dum in mancipio sit, decesserit, sui iuris fit.

long as the father is in mancipation the status of the child is in suspension, and if the father is manumitted the child falls under his power; if the father dies in mancipation the child becomes independent.

§ 135 *b*. Et de .... licet .... [1 *lin.*] ut supra diximus, quod in filio faciunt tres mancipationes, hoc facit una mancipatio in nepote.

§ 135 *b*. ... as before mentioned, the result of three mancipations of the son is obtained by a single mancipation of the grandson.

§ 136. *Mulieres, quamvis in manu sint, nisi coemptionem* fecer*int, potestate parentis non liberantur.* hoc *in Flaminica Diali senatusconsulto confirmatur*, q*uo ex auctoritate cōnsulum* Maximi et Tuberonis *cavetur, ut* haec quod *ad* sacr*a* tan*tu*m videatur in manu esse, quod vero ad cetera perinde habeatur, a*t*que si in manum no*n convenisset. Sed mulieres* q*uae in manum conveniunt per coemptionem a* potestate parentis liberantur: nec interest, an in viri sui manu s*int*, *an* extra*nei*; *quamvis* ha*e* solae loco filiarum habeantur quae in viri manu *s*unt.

§ 136. A wife subjected to the hand of a husband by confarreation is not thereby freed from the power of her father; and this is declared by the senatusconsult of the consuls Maximus and Tubero respecting the priestess of Jove, which limits the marital hand to the sphere of sacred rights, and declares the status of the wife unaffected in other respects by subjection to the hand of the husband. Subjection to hand by coemption liberates from the power of the parent, and it is immaterial whether it is a coemption subjecting the woman to the hand of a husband or to the hand of a stranger, although the status of quasi daughter only belongs to a woman in the hand of a husband.

§ 132. The epitomator of Gaius in the code of Alaric 2 mentions as present at an emancipation, besides the five witnesses and libripens, a seventh person whom he calls antestatus, who is also mentioned in the bronze tablet quoted in the remarks on pignus and fiducia, Book 3.

The vindicta or wand used in manumission, as already stated, was the rod or verge symbolizing a lance carried by the parties in a real action. The status of freedom (libertas) whether as opposed to slavery or to bondage (mancipii causa) was a real right (jus in rem), and therefore a subject to be contested in a vindicatio. Manumission by vindicta was a collusive vindicatio, in other words, an in jure cessio.

The epitomator of Gaius calls the person to whom the son was mancipated pater fiduciarius, which implies that the mancipation was accompanied by a fiducia or declaration of trust. The trust would be that the pater fiduciarius should make default or confess in the subsequent vindicatio.

§ 134. Assuming that in adoption, as in emancipation, the person to whom the son was mancipated was called pater fiduciarius, we find in adoption three fathers in the field, pater naturalis, pater fiduciarius, and pater adoptivus. It appears from § 135 *a* that though the status of bondage was formal or fictitious, yet to give an air of reality to the drama, the status was made to have a certain duration. So when a prince is advanced from the rank of private to that of general, a certain interval is interposed between the intermediate promotions for the sake of decorum, though, the whole proceeding being unreal, all the steps, if the authorities were so disposed, might be compressed into a single day. Ihering, § 46.

The status of paterfamilias or of filiusfamilias being, like other kinds of status, a real right, the claim of a person as filiusfamilias was a matter to be contested in a real action or vindicatio. This would seem the more obvious to the early jurists, as they probably drew no distinction between patria potestas and dominica potestas, i. e. between paternal power and absolute proprietorship. This claim was sometimes a matter of contentious (not voluntary) jurisdiction, i. e. of genuine litigation. Per hanc autem actionem liberae personae quae sunt juris nostri, utputa liberi qui sunt in potestate, non petuntur . . . . nisi forte adjecta causa quis vindicet. Unde si quis ita petit, filium suum, vel, in potestate ex jure Romano, videtur mihi et Pomponius consentire, recte eum egisse; ait enim, adjecta causa ex lege Quiritium vindicare posse, Dig. 6, 1, 2. 'If free persons, dependent on the plaintiff—for instance, children subject to his power—are sought to be recovered by vindication, the title or mode of dependence must be specified in the formula (intentio). Thus a claim of a person as son, or as subject to power by the law of Rome, even according to Pomponius, is regular: for he says that the specification of a title under a statute of the Quirites makes the vindication valid.' (The anomalous forms, ex jure Romano, ex lege Quiritium, instead of the usual, ex jure Quiritium, were perhaps peculiar to the pleadings in this kind of suit.)

Justinian simplified the formalities of emancipation and adoption. He allowed the former to be accomplished by a simple declaration before a competent magistrate, Inst. 1, 12, 6; and the latter by appearance of the parties before a competent judge and insinuatio i.e. a memorandum of the transaction in the public records of his office (actis intervenientibus), Cod. 8, 48, 11.

In English law children are enfranchised, and the limited power

of the father over their person and property is terminated by two events which did not operate emancipation in Roman law, marriage and arrival at years of discretion, that is, attainment of majority by the completion of twenty-one years of age. At these points, under English law, the empire of the father or other guardian gives place to the empire of reason; whereas neither marriage nor majority released the Roman son or daughter from patria potestas.

§ 137. [3 *lin.*] *remancipatione* de*sinunt* in manu esse, et *cum* ex *re*mancipatione m*anumissae* *f*uerint, su*i* *iuri*s e*fficiuntur* [3 *lin.*] nihil*o* magis *po*test *c*ogere, q*uam* filia patrem. set filia quidem nullo modo patrem *potest* cogere, etiamsi adoptiva sit: haec autem *virum* repudio misso proinde compell*ere potest*, atque si ei numquam nupta fuisset.

§ 137. A woman subjected to hand by coemption is released therefrom by remancipation, and on subsequent manumission becomes independent. A wife subject to marital hand can no more compel her husband to release her from his hand without dissolution of the marriage than a daughter can compel her father. A daughter, however, has no means of compelling her father, even if he is only such by adoption, whereas a wife by sending a message of divorce can compel her husband to release her from his hand, just as if they had never been married (i. e. as if he were a mere coemptionator).

§ 138. Ii qui in causa mancipii sunt, quia servorum loco habentur, vindicta, censu, testament*o* manumissi sui iuris fiunt.

§ 138. As persons in mancipation have the status of slaves, manumission by fictitious vindication, by entry on the censor's register, by testamentary disposition, are the modes by which they acquire independence.

§ 139. Nec tamen in hoc casu lex Aelia Sentia locum habet. itaque nihil requirimus, cuius aetatis sit is qui manumittit, et qui manumittitur: ac ne illu*d* quidem, an patronum creditoremve manumissor habeat. Ac ne numerus quidem legis Fu*r*iae Caniniae finitus in his personis locum habet.

§ 139. But to them the lex Aelia Sentia has no application: no age of the person manumitting or the person manumitted is required; the manumission is subject to no proviso against fraud on the rights of patron or creditors, nor even to the numerical limitation of the lex Furia Caninia.

§ 140. Quin etiam invito quoque eo cuius in mancipio sunt censu libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit, ut sibi remancipetur: nam quodammodo tunc pater potestatem propriam reservare sibi videtur eo ipso, quo*d* mancipio recipit.

§ 140. The assent of the holder in mancipation is not required for manumission by entry on the register of the censor, except when a son has been mancipated by a father with a condition of remancipation, for by such a condition the father is deemed to have reserved a certain

Ac ne is quidem dicitur invito eo cuius in mancipio est censu libertatem consequi, quem pater ex noxali causa mancipio dedit, velut qui furti eius nomine damnatus est, et *e*um mancipio actori dedit: nam hunc actor pro pecunia habet.

amount of parental power: the assent of the holder in mancipation is also necessary to manumission by entry on the censor's register when a delinquent son has been surrendered by his father in consequence of a noxal suit; when, for instance, the father has been condemned in an action for a theft committed by the son, and has by mancipation surrendered his son to the plaintiff in lieu of pecuniary damages.

§ 141. In summa admonendi sumus, adversus eos quos in mancipio habemus nihil nobis co*n*tumeliose facere licere: a*l*ioquin iniuriarum *actione* ten*ebimur*. Ac ne diu quidem in eo iure detinentur homines, set plerumque hoc fit dicis gratia uno *m*omento; nisi sc*i*licet ex noxali causa manciparentur.

§ 141. Finally, it is to be observed that contumelious treatment of a person held in mancipation is not permitted, but renders liable to an action of outrage; and the status generally is not persistent, but merely formal and momentary, except when it is the consequence of surrender in lieu of damages in an action of trespass.

§ 137. Dissolution of marriage was either by the consent of both parties (divortium) or by the act of one (repudium). The message of repudiation contained the formula, Tuas res tibi habeto, 'Take away thy property.' Mimam illam suam suas res sibi habere jussit, claves ademit, exegit, Cic. Phil. 2, 28. 'The actress was ordered to pack, deprived of the keys, turned out of the house.' The lex Julia de adulteriis prescribed a form for repudium, and required the message to be delivered by a freedman of the family, in the presence of seven witnesses above the age of puberty and citizens of Rome. The party who made a causeless repudium, or whose misconduct justified a repudium, was punished by pecuniary losses in respect of dos and propternuptial donations. After much veering legislation in later times, Justinian enacted that a man or woman who divorced without a cause should retire to a cloister and forfeit all his or her estate, one moiety to his or her successors, and the other moiety to the cloister. Nov. 134, 11.

§ 140. Ihering, § 32, infers from this that the census, like a year of jubilee, freed all but noxal and fictitious bondsmen at the end of five years: and that the Twelve Tables, in limiting a father to three mancipations, disabled him from selling the services of his son for more than fifteen years.

DE TUTELIS.

§ 142. Transeamus nunc ad aliam divisionem. nam ex his personis, quae neque in potestate neque in manu neque in mancipio sunt, quaedam vel in tutela sunt vel in curatione, quaedam neutro iure tenentur. videamus igitur quae in tutela vel in curatione sint: ita enim intellegemus ceteras personas quae neutro iure tenentur.

§ 142. Let us now proceed to another classification: persons not subject to power, nor to hand, nor held in mancipation, may still be subject either to guardianship or to administration, or may be exempt from both forms of control. We will first examine what persons are subject to guardianship and administration, and thus we shall know who are exempt from both kinds of control.

§ 143. Ac prius dispiciamus de his quae in tutela sunt.

§ 143. And first of persons subject to guardianship or tutelage.

§ 144. Permissum est itaque parentibus liberis quos in potestate sua habent testamento *tut*ores dare: masculini quidem sexus inpuberibus *dumtaxat, feminini autem tam inpuberibus* qu*am nubilibus.* veteres enim voluerunt feminas, etiamsi per*f*ectae aetatis sint, propter animi levitatem in tutela esse.

§ 144. The law allows a parent to appoint guardians in his will for the children in his power, below the age of puberty, if they are males; above the age of puberty, if they are females; for, according to our ancestors, even women who have attained their majority, from their intellectual weakness, require to be kept in tutelage.

§ 145. Itaque si quis filio filiaeque testamento tutorem dederit, et ambo ad pubertatem pervenerint, filius quidem desinit habere tutorem, filia vero nihilominus in tutela permanet: tantum enim ex le*ge* Iulia et Papia Pop*pa*ea iure liberorum a tutela liberantur feminae. loquimur autem exceptis virginibus vestalibus quas etiam veteres in honore*m* sacerdotii liberas esse voluerunt: itaque etiam leg*e* XII Tabularum cautum est.

§ 145. Accordingly, when a brother and sister have a testamentary guardian, on attaining the age of puberty the brother ceases to be a ward, but the sister continues, for it is only under the lex Julia and Papia Poppaea and by title of maternity that women are emancipated from tutelage; except in the case of vestal virgins, for these, even in our ancestors' opinion, are entitled by their sacerdotal function to be free from control, and so the law of the Twelve Tables enacted.

§ 146. Nepotibus autem neptibusque ita demum possumus testa*mento* tutores dare, si post mortem nostram in patris sui potestatem iure recasuri non sint. itaque si filius meus mortis meae tempore in potestate mea sit, nepotes quos ex eo *habeo* non poterint ex testamento meo habere tutorem, quamvis in potestate mea fuerint: scilicet quia mortuo me in patris sui potestate futuri sunt.

§ 146. A grandson or granddaughter can only receive a testamentary guardian provided the death of the testator does not bring them under parental power. Accordingly, if before the grandfather's death the father was in the grandfather's power, the grandchildren, though in the grandfather's power, cannot have a testamentary guardian, because his death leaves them in the power of the father.

§ 147. Cum tamen in compluribus aliis causis postumi pro iam natis habeantur, et in hac causa placuit non minus postumis, quam iam natis testamento tutores dari posse: si modo in ea causa sint, ut si vivis nobis nascantur, in potestate nostra fiant. hos etiam heredes instituere possumus, cum extraneos postumos heredes instituere permissum non sit.

§ 147. As in many other matters after-born children are treated on the footing of children born before the execution of the will, so it is ruled that after-born children, as well as children born before the will was made, may have guardians therein appointed, provided that if born in the testator's lifetime they would be subject to his power [and immediate successors], for the inheritance may be devised to such after-born children, but not to after-born strangers.

§ 148. *Uxori* quae in manu est proinde acsi filiae, item nurui quae in fili*i* manu est proinde ac nepti tutor dari potest.

§ 148. A wife in the testator's hand may receive a testamentary guardian as if she were a daughter, and a son's wife in the son's hand as if she were a granddaughter.

§ 149. Rectissime autem tutor sic dari potest: LUCIUM TITIUM LIBERIS MEIS TUTOREM DO. sed et si ita scriptum sit: LIBERIS MEIS vel UXORI MEAE TITIUS TUTOR ESTO, recte datus intellegitur.

§ 149. The most regular form of appointing a guardian is in the following terms: 'I APPOINT'—or, 'I DEVISE AND APPOINT—LUCIUS TITIUS GUARDIAN TO MY CHILDREN;' the form, 'BE LUCIUS TITIUS GUARDIAN TO MY CHILDREN'—or, 'TO MY WIFE'—is also valid.

§ 150. In persona tamen uxoris quae in manu est recepta est etiam tutoris optio, id est, ut liceat ei permittere quem velit ipsa tutorem sibi optare. hoc modo: TITIAE UXORI MEAE TUTORIS OPTIONEM DO. quo casu licet uxori *eligere tutorem* vel in omnes res vel in unam fort*e* aut duas.

§ 150. To a wife in his hand a testator is permitted to devise the selection of her guardian, that is, he may authorize her to choose whom she pleases, in the following terms: 'TO TITIA MY WIFE I DEVISE THE SELECTION OF HER GUARDIAN;' whereupon she may nominate either a general guardian or a guardian for certain specified matters.

§ 151. Ceterum aut plena optio datur aut angusta.

§ 151. The option of a guardian may be limited or unlimited.

§ 152. Plena ita dari solet, ut proxum*e* supra diximus. angusta ita dari solet: TITIAE UXORI MEAE DUMTAXAT TUTOR*IS* OPTIONEM SEMEL DO, aut DUMTAXAT BIS DO.

§ 152. Unlimited option is usually devised in the form above mentioned; limited option in the following terms: 'TO TITIA MY WIFE I DEVISE NOT MORE THAN ONE OPTION' —or, 'NOT MORE THAN TWO OPTIONS —OF A GUARDIAN.'

§ 153. Quae optiones plurimum inter se differ*u*nt. nam quae plenam optionem habet potest semel et bis et ter et saepius tutorem optare.

§ 153. The effect of these forms is very different: unlimited option is a power of changing the guardian an indefinite number of times;

quae vero angustam habet optionem, si dumtaxat semel data est optio, amplius quam semel optare non potest: si tantum bis, amplius quam bis optandi facultatem non habet.

limited option is the right of a single choice, or of two choices, as may happen.

§ 154. Vocantur autem hi qui nominatim testamento tutores dantur, dativi; qui ex optione sumuntur, optivi.

§ 154. A guardian nominated by the testator is called a dative guardian; one selected by the widow is called an optative guardian.

Having examined those inferiorities of legal capacity which constituted a status, we now proceed to examine certain cases of incapacity which, though analogous to the former as belonging to the sphere of unequal rights, were not included by the Romans under the denomination of status. The inferiorities of capacity in infancy, minority, wardship, curatel, were not so considerable as those which we have hitherto examined. The diminution of rights in a lapse from independence to curatel was less than the least capitis minutio, and accordingly a prodigal who was interdicted from the administration of his estate and subjected to the control of a curator, was not said to undergo a status mutatio: his patrimony still vested in him, though he was deprived of its administration; whereas adrogatio and in manum conventio divested a person of the capacity of ownership and active obligation: inferior status, in a word, is incapacity of right; wardship and curatel are only incapacities of disposition.

Guardianship is thus defined: Est autem tutela jus ac potestas in capite libero, ad tuendum eum qui propter aetatem se defendere nequit, jure civili data ac permissa, Inst. 1, 13, 1. 'Guardianship is a right and power over an independent person conferred or authorized by the civil law for the protection of one who is incapacitated by age for self-defence.' The duties of the guardian related both to the person and to the property of the ward. In respect of his person, the guardian was charged with the care of his nurture and education: in respect of his property, the guardian's function was distinguished as either exclusive administration or concurrent interposition of authority. Up to the age of seven the ward was called infans, and during this period the guardian acted alone (administratio, negotiorum gestio); after the completion of seven years until the age of puberty (fourteen for males, twelve for females) the ward acted, and the guardian concurrently gave his

sanction (auctoritas). Even in the latter period the guardian might act alone or concurrently according to his discretion: he probably gave his sanction in proceedings governed by the Civil law [Nemo alieno nomine lege agere potest, Dig. 50, 17, 123. 'No appearance in another person's name, i. e. no representation or agency, is admissible in statute-process'], and simply administered in proceedings governed by the law of nations. In the time of Gaius, women continued subject to guardianship after the age of puberty: the functions of the guardian were then confined to auctoritas, which in most cases was a mere formality; the power of administration vested in the woman, § 190.

§ 147. Postumus (afterborn) has no etymological connection with inhumation, and no reference to the death of the testator, but simply denotes a person born after the execution of a will, whether after the death or in the lifetime of the testator. The law, however, originally made a distinction between the two cases. The institution or disinherison of a postumus born after the death of a testator was valid at Civil law, and availed to save the will from rupture by afterbirth (agnatio) of an immediate successor (suus heres): the same institution or disinherison would have been invalid and unavailing if the postumus had been born in the lifetime of the testator, before the enactment of the lex Junia Velleia in the reign of Augustus, 2 § 130, commentary. A grandson was postumus alienus if born in the lifetime of his father; he was postumus suus, i. e. immediate lineal successor to his grandfather, if born after the death of his father, 2 § 241, and only in this event could he receive a guardian by the will of his grandfather. Aquillius Gallus invented a form for the conditional institution or disinherison of a grandson, and, doubtless, also for the nomination of his guardian, by a will executed in the lifetime of his father: conditioned, that is, to take effect in the event of the decease of the father before the death of the grandfather. It appears, then, that the statement of Gaius, § 147, is inaccurate, unless we complete it by words taken from the parallel passage in the Institutes, and read: Si modo in ea causa sint ut, si vivis nobis nascantur, [sui et] in potestate nostra fiant.

§ 148. In filii manu must be regarded as an inaccurate expression: for filiusfamilias was incapable of all civil rights, including manus, and could only serve as a conduit-pipe by which the right of manus vested in his father.

DE LEGITIMA AGNATORUM TUTELA.

§ 155. Quibus testamento quidem tutor datus non sit, iis ex lege XII agnati sunt tutores, qui vocantur legitimi.

§ 156. Sunt autem agnati per virilis sexus personas cognatione iuncti, quasi a patre cognati: veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patrui filius *et nepos* ex eo. At hi qui per feminini sexus *personas cognatione iunguntur non sunt agnati, sed alias* naturali iure cognati. i*taque* inter avunculum et sororis filium non agnatio est, sed cognatio. item amitae, materterae filius non est mihi agnatus, set cognatus, et invicem scilicet ego illi eodem iure coniun*gor*: quia qui nascuntur patris, non matris familiam sequuntur.

§ 157. Sed olim quidem, quantum ad legem XII tabularum attin*et*, etiam feminae agnatos habebant tutores; *s*et postea lex Claud*i*a lata est quae, quod ad feminas attin*et*, tutelas *illas* sustulit. itaque masculus quidem inpubes fratrem puberem aut patruum habet tutorem; feminae vero talem habere tutorem non *intelleguntur*.

§ 158. Set agnationis quidem ius capitis diminutione perimitur, cognationis vero ius non commutatur: quia civilis ratio civilia qu*id*em iura corrumpere potest, naturalia vero non potest.

§ 155. In default of a testamentary guardian the statute of the Twelve Tables assigns the guardianship to the nearest agnates, who are hence called statutory guardians.

§ 156. Agnates (3 § 10) are cognates through males, that is, through their male ascendents: as a brother by the same father, such brother's son or son's son; a father's brother, his son or son's son. Cognates through female ascendents are merely natural kinsmen. Thus, between a man and his sister's son there is not agnation, but cognation: so my father's sister's son or my mother's sister's son is not my agnate, but my cognate, and viceversa; for children are members of their father's family, but not of their mother's.

§ 157. In former times, the statute of the Twelve Tables made females as well as males wards of their agnates: subsequently a law of the Emperor Claudius abolished this wardship in the case of females: accordingly, a male below the age of puberty has his brother above the age of puberty or his paternal uncle for guardian, but females are not in the wardship of their agnates.

§ 158. Loss of status extinguishes rights by agnation, while it leaves unaffected rights by cognation, because civil changes can affect rights annexed to a civil title, but not rights annexed to a natural title.

The maxim of the Civil law is stated by Justinian: Plerumque ubi successionis est emolumentum, ibi et tutelae onus esse debet, Inst. 1, 17. 'As a general rule, those that have the emolument of succession should bear the burden of guardianship.' Feudal law, and its daughter, the Common law, in respect of guardianship in socage, was guided by the opposite policy. Guardianship in socage

occurs when lands descend upon a minor, and devolves by the Common law upon those of his next of blood upon whom the inheritance cannot descend. Thus, if the lands descend to the heir from the paternal line, the mother or other nearest maternal relative shall have the guardianship; and vice-versa, the father or other nearest paternal relative, if the lands descend from the maternal line. While recognizing that proximity of blood is a natural recommendation to this office, the Feudal law judges it improper to trust the person of the infant into the hands of a possible heir, for fear he should be tempted to abuse his trust. The law of Scotland and the ancient law of France took a middle course, and committed the pupil's estate to the person entitled to the legal succession, because he is most interested in preserving it from waste, but excluded him from the custody of the pupil's person, because his interest is placed in opposition to the life of the pupil. Coke and Blackstone triumph in the superior wisdom of the Common law compared with the Roman law. Kent, the American jurist, is inclined to believe that the English, the Scotch, and the French law equally proceed on too great a distrust of the ordinary integrity of mankind. It is, however, noteworthy that the fears and precautions of Feudal law, though not imitated by the Roman legislator, were paralleled by Roman testators when they made a substitution, that is, a devise to a second successor, in the event of the first successor dying before attaining to years of puberty (pupillaris substitutio), 2 § 181. It is perhaps less remarkable that a legislator should seek by a general rule to guard against occasional depravity, than that a testator, exercising an individual choice, should select for the successor of his fortunes a person whom he believes capable of the blackest crime.

§ 158. The maxim here enunciated is calculated to give a false idea of the relation of the institutes of Gentile law to those of Civil law. Title by cognation is just as much an institute of Positive law as title by agnation. The synthesis of title and right in Civil law may be freakish and capricious, while that in Gentile law is reasonable and expedient; but both are equally positive institutions, and both are equally mutable and liable to be overruled. Accordingly, the specious-sounding maxim, that revolutions in status or civil condition cannot affect such rights as are annexed to natural titles, crumbles away as soon as we examine it, for we find that it only holds good of the most insignificant change, the minima

capitis minutio, 3 § 27, and that maxima and media capitis minutio extinguish gentile title by cognation as well as civil title by agnation, Inst. 1, 16, 6.

The truth is, that the effects of a collision of Civil and Natural law fall under two very different classes, which it is important to distinguish.

1. If the command of the civil lawgiver, under the sway of motives financial, political, ethical, or religious, is highly imperious and absolutely compulsive, all natural titles with which it may come in conflict are absolutely void and inoperative: e.g. the Sc. Velleianum, prohibiting suretyship of women, allowed no naturalis obligatio to be produced by any such suretyship: and so with the laws prohibiting gambling and usury.

2. If the command of the civil law is less peremptory and absolute, it may deprive any conflicting natural title of plenary force, and yet leave to it a naturalis obligatio capable of acquiring efficacy by some machinery of Positive law; e.g. the Sc. Macedonianum, prohibiting money loans to a filiusfamilias without the sanction of his father, made them irrecoverable by action, and yet the courts recognized in the borrowing filiusfamilias a naturalis obligatio, which was capable of novation, Dig. 46, 2, 19, and a bar to recovery back (condictio indebiti) in case of actual repayment, Dig. 14, 6, 10.

When Justinian revolutionized the law of intestate succession and made the right of succession depend on cognation instead of agnation, he made a corresponding change in the obligation of guardianship, which henceforth devolved on cognates instead of agnates, women as formerly, with the exception of mothers and grandmothers, being excluded from the office, Nov. 118, 5.

DE CAPITIS MINUTIONE.

§ 159. Est autem capitis diminutio prioris *capitis* permuta*tio*. *ea*que tribus modis accidit: nam aut maxima est capitis dimi*nutio*, aut minor, quam quidam mediam vocant, aut minima.

§ 159. Loss of status, in other words, civil degradation or diminution of civil rights, is of three orders, greatest, minor or mediate, and least.

§ 160. Maxima est *ca*pitis diminutio, cum aliquis simul et civitatem et libertatem amittit; quae . . . . qui ex patria [3½ *lin.*]; *item feminae liberae ex senatusconsulto* Clau-

§ 160. The greatest loss of status is the simultaneous loss of citizenship and freedom, which is the consequence of . . . . or under the Sc. Claudianum of persistent inter-

diano ancillae fiunt eorum dominorum, *qui*bus invitis et denunciantibus *nihilo* min*us* cum servis *eorum* coierint.

course on the part of a freewoman with another person's slave in spite of the prohibition and denunciation of the owner.

§ 161. Minor cap*itis* dim*inutio est, cum civitas quidem* am*it*titur, libertas vero retinetur. *quod accidit ei cui a*qua et igni interdictum *fuerit.*

§ 161. Minor loss of status is loss of citizenship unaccompanied by loss of liberty, and is incident to interdiction of fire and water.

§ 162. Minima *capitis* diminutio est, *cum et civ*itas et libertas ret*inetur, sed status hominis commutatur. quod accidit* in his qui adoptantur, item in his qui coemptionem faciunt, et in his qu*i* mancipio dantur, quique ex mancipatione manumittuntur; adeo quidem, ut quotien*s* quisque mancipetur, a*ut remancipe*tur, totiens capite diminuatur.

§ 162. The least loss of status is descent in domestic rights without loss of citizenship or freedom, and occurs in adoption, coemption, noxal surrender, and manumission by mancipation, and so inseparably that each successive mancipation by the natural father, and every remancipation by a coemptionator, is a fall in domestic status.

§ 163. Nec solum maior*ibus* diminutionibus ius adgnationis corrumpitur, sed etiam minima. et ideo si ex duobus liberis alterum pater emancipaverit, *post* obi*tum* eius neuter alteri agnationis iur*e tutor esse* poterit.

§ 163. Not only by the two greater losses of status are rights of agnation extinguished, but also by the least: accordingly, if one of two children is emancipated, the elder cannot on the father's decease be guardian to the younger by right of agnation.

§ 164. Cum autem ad agnatos tutela *pertinet, non* simul ad omnes pertinet, set ad eos tantum qui proximo gradu sunt. [*desunt lin.* 24.]

§ 164. When agnates are entitled to be guardians, it is not all who are so entitled, but only those of the nearest degree.

§ 160. In the lines now illegible, Gaius may have mentioned, as causes reducing to slavery, surrender by the pater patratus to a foreign state for an offence against international law, Livy, 5, 36, or non-inscription on the censorial register (cum incensus aliquis venierit, Ulp. 11, 11), or evasion of military service (populus quum eum vendidit qui miles factus non est, Cic. Pro Caec. 34), or capture by the enemy, § 129, or condemnation for a capital crime, which made the convict a slave of punishment (servus poenae, Inst. 1, 16, 1), i. e. reduced him to penal servitude, or condemnation of a freedman for ingratitude towards his patron (libertus ingratus circa patronum condemnatus, ibid.) whereupon he forfeited his freedom, or collusion of a freeman in consenting to be sold as a slave on condition of sharing the purchase-money (cum liber homo,

major viginti annis, ad pretium participandum sese venundari passus est, Inst. 1, 3, 4). After the price had been paid, the vendor disappeared, the supposed slave recovered his liberty by a liberalis causa, and the purchaser was left without his slave and without his money. To check this fraud a statute enacted, that if the person sold was twenty years old at the time of the sale or partition of the price, he should really become the slave of the purchaser, Dig. 40, 12, 7.

The libertus ingratus would exemplify a fall from the condition of libertinus to that of servus; any of the other instances might be a case of a fall from ingenuus to servus; the fall from ingenuus to libertinus would also by the definition (a descent from a higher to a lower grade in the category of liberty) be a case of capitis minutio maxima, and occurred by the operation of the Sc. Claudianum. A freewoman (ingenua) who had commerce with a slave with the consent of his proprietor procreated slaves without forfeiting her own freedom, § 84; she lost status, however, for she became the freedwoman of the proprietor, Paulus, 4, 10, 2; Tac. Ann. 12, 53.

§ 161. Under the category of Civitas, as there are three classes, civis, latinus, peregrinus, so there are three possible degradations, the fall from civis to Latinus, instanced in the emigrant to a Latin colony, § 131; the fall from civis to peregrinus, instanced in the interdiction or deportation of a civis; and the fall from Latinus to peregrinus, instanced when the same events happened to Latinus. A lapse from liber to servus was a dissolution of marriage, for servus was incapable of matrimony: a lapse from civis to peregrinus was a dissolution of civil wedlock (connubium), for this could only subsist between cives; but if both parties consented, they might continue in gentile wedlock, Cod. 5, 17. The confiscation of property or universal succession of the fiscus, which accompanied greatest and minor loss of status, was not a necessary incident of capitis minutio (it did not happen when civis became Latinus by emigration; and an alien, which a citizen became by deportation, was capable of holding property), but was a special provision of the criminal code.

The political elements of civitas, suffragium and honores, were forfeited by infamy (infamia) or loss of civic honour (existimatio); and hence arises the question whether infamia is to be regarded as a capitis minutio.

In the commencement of this commentary we alluded to the law of honour to illustrate the difference of positive law from all law

not positive; but in Rome the law of honour, as the law of religion in most modern states, was partially taken up into positive legislation. The public sentiments of esteem and disesteem, that is to say, were armed with political sanctions, and thus certain proceedings were discouraged which were not otherwise prohibited by positive law, and the due application of these sanctions was the function of a special organ appointed by the legislator. This organ was the censor, who had both a discretionary power of branding a man with ignominy by an annotation against his name in the civic register (notatio, subscriptio censoria), and, as revisor of the lists of the senate, the knights, and the tribes, enforced the disabilities of infamy by removing the infamous person from any of those bodies. As the Comitia Centuriata, as well as the Comitia Tributa, had in later times been connected with the division into tribes, the tribeless man (aerarius) forfeited his vote and became incapable of military service, Livy, 7, 2. These graver consequences of infamy were not in the discretion of the censor, but governed by strict rules of consuetudinary law (jus moribus introductum). Infamy was the consequence of condemnation in any criminal trial (publicum judicium); in certain civil actions founded on delict, theft, rapine, outrage, fraud; or on certain contracts, such as partnership, agency (mandatum), deposit; or on quasi contract, such as guardianship; or of insolvency (bona possessa, proscripta, vendita); or, without any judicial condemnation, was annexed to certain violations of the marriage laws, such as bigamy or the marriage of a widow before the termination of her year of mourning, and to the pursuit of certain professions, such as that of stage-player or gladiator. In some of these latter instances consuetudinary law, as above intimated, inflicted positive sanctions on acts that originally had only been prohibited by the sanctionless law of honour. In view of these consequences, infamia may at one time have been regarded as capitis minutio. Cicero pro Quinctio speaks of a suit involving existimatio as a causa capitis, and Tertullian, the father of the Church, who was noted for his knowledge of Roman law, and possibly was identical with the jurist of that name, of whom five fragments are preserved in the Digest, speaks of infamia as capitis minutio, De Spectaculis, 22. But the political rights of civitas had ceased to be of importance under the emperors, and we are expressly told in the Digest that infamy did not constitute a status mutatio, Dig. 50, 16, 103.

Besides extinguishing the political or publicistic elements of civitas, infamia affected to a certain extent its private elements, both commercium and connubium; the former, as we shall see, in respect of the office of procurator, 4 § 124, and the latter in respect of the disabilities of celibacy under the lex Julia, which were not removed by marriage with an infamis. Both these classes of disability had practically vanished even before they were abolished in the time of Justinian.

This seems the proper place to notice certain inequalities of condition, analogous to the old distinctions of status, which grew up in the later ages of Rome, and some of which survived the fall of the Roman empire. From the establishment of the empire the army was caressed by each succeeding despot, and privileges of various kinds were so accumulated on the military service, that the relation of the soldiery to the rest of the world very much resembled the ancient relation of Romanus to peregrinus. The pre-eminence of the military caste was the result of elevation; other unprivileged castes were created by depression. As the new religion grew to political power, zealous legislators were eager to promote its ascendency by the means of political sanctions. Pagans, Jews, heretics, apostates, protestants, papists, were successively frowned upon by the legislator, and for a long season subjected to incapacities and disabilities as great as, or greater than, those which weighed upon infamis: until by a change in political conceptions these inequalities of right have been again levelled and almost obliterated in most of the codes of modern Europe. See also the remarks on Colonatus, 3 § 145.

§ 162. In the category of domestic position there are three classes, (1) sui juris, or paterfamilias and materfamilias; (2) filiusfamilias and filiafamilias; and (3) mancipium: but there are only two possible degradations, (1) from sui juris to filius- or filiafamilias, which occurs in adrogation and the in manum conventio of a woman previously independent; and (2) from filius- or filiafamilias to mancipium, which occurs in noxal surrender, in emancipation, in adoption as implying mancipation, and in the remancipation of a woman by her husband or the person who held her in manu in virtue of a fiduciary coemption. The descent from sui juris to mancipium cannot occur, because the only persons capable of passing into the condition of mancipium by the process of mancipation were filius- and filiafamilias and women in manu, i.e.

persons already alieni juris. If remancipation is mentioned in § 162 it cannot mean remancipation to the natural father after the third mancipation of a child in the process of emancipation or adoption, § 134, for this remancipation involves no descent in status: by the effect of the third mancipation the child is already in the state of bondage, and after remancipation he continues in the same state, without having descended to any lower stage in the hierarchy of status. The remancipation which operates a degradation must be remancipation by the husband or coemptionator, whereby a filiafamilias or woman in manu is reduced from that rank to the lower standing of mancipium, §§ 115, 137, 195.

In the translation of the text, and in the exposition of capitis minutio, and particularly of the third and last kind, I have adopted the theory of Savigny as being the most tenable, and forming the most harmonious system of legal conceptions. I must now briefly notice an opposing theory, and the objections that may be raised against that of Savigny. Some expositors hold that capitis minutio minima did not necessarily and essentially involve any degradation, any downward step on the ladder of status, but might be merely a horizontal movement on the same platform, a transit from family to family, a disruption of the ties of agnation, a cessation of membership in a given civil group. This opinion is founded on the authority of Paulus, undeniably an eminent juris auctor, who defines the least diminution of head as follows: Capitis deminutionis tria genera sunt, maxima, media, minima; tria enim sunt quae habemus, libertatem, civitatem, familiam. Igitur cum omnia haec amittimus, hoc est, libertatem et civitatem et familiam, maximam esse capitis deminutionem; cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminutionem; cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem, constat, Dig. 4, 5, 11. 'Capital diminution is of three orders, greatest, minor, least; as there are three things that we have, liberty, citizenship, family. The universal loss of freedom, citizenship, family, is the greatest capital diminution: loss of citizenship while liberty is retained is minor capital diminution: when liberty and citizenship are retained, and family only is changed, there is the least capital diminution.' Consistently with this definition Paulus affirms that the children of adrogatus suffer capitis minutio minima: Liberos qui arrogatum parentem sequuntur, placet minui capite, quum in aliena potestate

sint et familiam mutaverint, Dig. 4, 5, 3. 'The children who follow an adrogated parent suffer diminution of head, as they are dependent and have changed family.' Here, then, if Paulus is right, we have capitis minutio without any degradation, any loss of rank; for the children of adrogatus have the same status of filiifamilias after their father's adrogation as they had before, although in a different family. The proposition, however, that the children of adrogatus suffer capitis minutio is not confirmed by any other jurist, and Savigny supposes that the doctrine was peculiar to Paulus, and was in fact inaccurate. Another objection to the theory of Savigny, though not so serious as the opposing authority of Paulus, is presented by the operation of in manum conventio.

When an independent woman made a coemption she undoubtedly declined in status, as before coemption she was sui juris, and after coemption she is filiafamilias. But a filiafamilias who made a coemption apparently suffered no degradation: the definitive result of the coemption leaves her, as before, filiafamilias, and that, apparently, without having passed through any lower stage; for Gaius expressly says that the lex mancipii, or formula of mancipation in coemption, was not calculated to reduce the woman to a servile condition, § 123. Gaius tells us, however, that coemption operates a capitis minutio, § 162, without limiting the effect to the case of a woman sui juris. The operation of coemption to produce capitis minutio is also mentioned by Ulpian, and again without any express limitation to the case of an independent woman: Minima capitis diminutio est per quam, et civitate et libertate salva, status dumtaxat hominis mutatur; quod fit adoptione et in manum conventione, 11, 13. 'There is least capital diminution when both franchise and freedom are unimpaired, and only position in household life is changed, as occurs in adoption and subjection to hand.' If filiafamilias underwent capitis minutio when she made a coemption, her case disproves our theory that all capitis minutio requires degradation: but Savigny assumes that, though in these passages there is no express limitation to the case of independent women, yet this limitation must be understood; and there is nothing outrageous in this supposition.

While, however, these objections to the hypothesis of Savigny are doubtless serious, on the other hand they are compensated by legal facts which are absolutely irreconcilable with the adverse hypothesis, the cases of Flamen Dialis and Virgo Vestalis. Virgo

autem Vestalis simul est capta atque in atrium Vestae deducta et pontificibus tradita, eo statim tempore sine emancipatione ac sine capitis minutione e patris potestate exit et jus testamenti faciendi adipiscitur . . . . Praeterea in commentariis Labeonis quae ad duodecim tabulas composuit ita scriptum est: Virgo Vestalis neque heres est cuiquam intestato, neque intestatae quisquam, sed bona ejus in publicum redigi aiunt, Gellius, 1, 12. 'As soon as a vestal virgin is selected and conducted to the shrine of Vesta and delivered to the pontifices, she instantaneously, without emancipation and without capital diminution, is freed from parental power and acquires testamentary capacity. . . . Moreover, in the commentary of Labeo on the Twelve Tables it is stated that a vestal virgin is neither heiress-at-law to any one who dies intestate nor, if she herself die intestate, leaves any heir-at-law, and that in this event her property lapses to the state.' For Flamen Dialis, see 3 § 114. If mere transit from a family and ceasing to belong to a given group of agnates constituted capitis minutio, and was its definition, then the vestal virgin must inevitably have suffered capitis minutio; the fact that she did not, in spite of leaving her family and snapping the agnatic tie, is at once conceivable, on the supposition that there is no capitis minutio without degradation.

Unless capitis minutio minima involved a downward step on the stair of status, it has no analogy to the other forms of capitis minutio, and it is not obvious why it should have the same generic appellation, or why it should be handled in the same department of the code. The rupture of the ties of agnation, extinguishing rights of intestate succession, might be a loss, but it was not a loss from inferiority of privilege; it was a loss of an equal among equals; it resembled the loss which a husband incurred by divorce of his wife, or a father by emancipation of his son, or a devisee or heir by neglecting to accept a succession within the appointed period, 2 § 164; none of which persons were said to undergo capitis minutio, because none of them suffered a reduction of the universitas juris called status.

On the whole, then, Savigny seems justified in considering the definition given by Paulus and his statement respecting the children of adrogatus as inexact. Paulus himself, in speaking of emancipation, implies the true conditions of capitis minutio: Emancipato filio et ceteris personis capitis minutio manifeste accidit, quum emancipari nemo possit nisi in imaginariam servilem causam de-

ductus, Dig. 4, 5, 3. 'An emancipated son or other descendant clearly has his head diminished, as emancipation necessarily involves an imaginary descent into a servile condition.'

Although rupture of the ties, and forfeiture of the rights, or release from the duties, of agnation, were not the essence of capitis minutio minima, yet they were among its principal consequences. The capite minutus lost his claim as suus heres at civil law, that is, his right to succeed to an intestate ascendent, or to be instituted heir in his will or formally disinherited. These effects of capitis minutio were, however, counteracted by jus praetorium or the legislation of the praetor. He also lost his right as legitimus heres at civil law, that is, his right to succeed to an intestate collateral; and here the praetor only so far interposed to assist the capite minutus, as, in default of all persons entitled as agnates, to call him to the succession in the inferior order of cognates. The collateral successor was called legitimus heres (statutory successor) because his title was founded on the statutes of the Twelve Tables, which, in default of lineal descendants, called collateral agnates to the succession. Subsequent statutes created certain quasi agnates or persons entitled to succeed in the same order as if they were agnates, who hence were also called legitimi heredes; e.g. children entitled to succeed to an intestate mother under the Sc. Orphitianum, and mothers entitled to succeed to intestate children under the Sc. Tertullianum. The effect of capitis minutio in extinguishing title to succeed was confined to legitimus heres created by the Twelve Tables, and did not extend to the legitimus heres created by these subsequent statutes.

Besides the effects of capitis minutio which followed logically from its consisting in a degradation or fall in status, and from its involving elimination from a given family or a certain circle of agnates, it had certain other anomalous or arbitrary consequences—consequences, that is, which may have once been explicable on known maxims of the civil law, but which are now inexplicable, whose rationale had perhaps been lost even in the classical period, and is certainly now past conjecture. Such is the rule, that capitis minutio minima extinguished the debts of capite minutus. It is true that the injustice operated by this rule of civil law in the case of adrogatio was counteracted by the interposition of the praetor, 3 § 84, but, as at civil law filiusfamilias, though incapable of rights, was capable of obligations, it is not obvious why even at civil law a

man's debts should have been cancelled by his degradation from the status of paterfamilias to that of filiusfamilias.

DE LEGITIMA PATRONORUM TUTELA.

§ 165. *Ex eadem lege duodecim tabularum libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quae et ipsa legitima tutela vocatur; non quia nominatim ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. eo enim ipso, quod hereditates libertorum libertarumque, si* intestati decessissent, *iusserat lex ad patronos* liberosve eorum pertinere, crediderunt veteres voluisse legem etiam tutelas ad eos pertinere, cum et agnatos quos ad hereditatem vocavit, eosdem et tutores esse iusserat.

§ 165. The same statute of the Twelve Tables assigns the guardianship of freedmen and freedwomen to the patron and the patron's children, and this guardianship, like that of agnates, is called statutory guardianship, not that it is anywhere expressly enacted in that body of statutes, but because their interpretation by the jurists has procured for it as much reception as it could have obtained from express enactment; for the fact that the succession of a freedman or freedwoman, when they die intestate, was given by the legislator to the patron and patron's children, was deemed a proof of his intention to give them the wardship, because when he was dealing with agnates he had coupled wardship with succession.

DE FIDUCIARIA TUTELA.

§ 166. Exemplo patronorum *etiam fiduciariae tutelae receptae* sunt. *eae enim tutelae scilicet* fiduciariae vo*cantur proprie*, quae ideo nobis competunt, quia *liberum* caput mancipatum nobis vel a parente vel a coemptionatore manumiserimus.

§ 166. The analogy of the patron guardian led in its turn to fiduciary guardianship. Fiduciary guardianship arises when a free person, mancipated by a parent or by the party to a coemption, is manumitted by the alienee.

§ 167. Set Latinarum et Latino*rum* inpuber*um tutela non omni* modo ad *manumissores, sicut bona eorum*, pertinet, sed ad eos quorum *ante manu*missionem ex iure Quiritium *fuerunt: unde si ancilla ex iure Quiritium* tua sit, in bonis mea, a me quidem solo, non etiam a te manumissa, Latina fieri potest, et bona *eius ad me pertinent, sed eius tutela* tibi competit: nam ita lege Iunia cavetur. itaque si ab eo cuius et in bonis et ex iure Quiri-

§ 167. The guardianship of Latins, male or female, below the age of puberty, does not necessarily devolve on their manumitter, like their succession, but on whoever before manumission was their quiritary owner. Accordingly, a female slave belonging to you as quiritary owner, to me as bonitary owner, if manumitted by me without your joining in the manumission, becomes a Latin, and her succession devolves on me, her guardianship on you, by

tium ancilla fuerit facta sit Latina, ad eundem et bona et tutela pertinet.

the enactment of the lex Junia. If, on manumission by one who combines the characters of bonitary and quiritary owner, she becomes a Latin, he becomes both her successor and her guardian.

DE CESSICIA TUTELA.

§ 168. *Agnatis, qui legitimi tutores sunt, item manu*missoribus permissum est feminarum tutelam alii in iure cedere: pupillorum autem tutelam non est permissum cedere, quia . . n *videtur* . . osa, cum tempore pubertatis finiatur.

§ 168. Statutory guardians, whether agnates or patrons, are permitted to transfer the guardianship of a female ward by surrender before a magistrate; the guardianship of a male ward is not allowed to be transferred, because it is not considered onerous, being terminated by the ward's attaining the age of puberty.

§ 169. Is autem cui ceditur tutela cessicius *tu*tor vocatur.

§ 169. The surrenderee of a guardianship is called a cessionary guardian.

§ 170. Quo mortuo aut capite diminuto revertitur ad eum tutorem tutela qui cessit. ipse quoque qui cessit, si mortuus a*u*t capite d*iminutus* sit, a cessi*ci*o tutela discedit et revertitur ad eum, qui post eum qui cesserat secundum gradum in tutela habueri*t*.

§ 170. On his death or loss of status the guardianship reverts to the surrenderor, and on the surrenderor's death or loss of status it is devested from the cessionary and devolves on the person next entitled after the surrenderor.

§ 171. Set quantum ad agnatos pertinet, nihil hoc tempore de cessicia tutela quaeritur, cum agnatorum tutelae in feminis lege Claudia sublatae sint.

§ 171. As far, however, as agnates are concerned, in the present day there is no such thing as cessionary guardianship, for agnatic guardianship over female wards was abolished by the lex Claudia.

§ 172. Sed fiduciarios quoque quidam putaverunt cedendae tutelae ius non habere, cum ipsi se oneri subiecerint. quod etsi placeat, in parente tamen qui filiam neptemve aut proneptem alteri ea lege mancipio dedit, ut sibi remanciparetur, remancipatamque manumisit, idem dici non debet, cum is et legitimus tutor habeatur; et non minus huic quam patronis honor praestandus est.

§ 172. Fiduciary guardians, according to some, are also disabled from transferring their guardianship, having voluntarily undertaken the burden; but although this is the better opinion, yet a parent who has mancipated a daughter, granddaughter, or great-granddaughter, with a condition of remancipation to himself, and manumitted her after remancipation, should be excepted from the rule, for he is ranked with statutory guardians, and has the same privilege as the patron of a manumitted slave.

§ 167. It seems anomalous that a Latin, i.e. a non-civis, should have been a subject of wardship: for as tutela is an institute of jus civile (§ 142, commentary), i.e. jus civium, we should have expected that, as in the case of patria potestas, both pater and filius must be cives Romani, § 128, so here both parties, the ward as well as the guardian, must of necessity be cives Romani. The anomaly, however, was expressly enacted by the lex Junia: which further departed from the law of the Twelve Tables by separating the guardianship from the right of succession; for it gave the guardianship to the quiritary owner, but the right of succession to the bonitary owner. Latinus was not only capable of being a ward, but also of being a guardian, Fragmenta Vaticana, 193; that is, though he was incapable of being a testamentary guardian, § 23, he could be made a tutor dativus, or appointed by a magistrate, § 185. This magisterial disregard of the spirit of the lex Junia is similar to the praetor's behaviour in respect of another of its dispositions. The law disabled Latins from taking as devisees or legatees under a will; the praetor allowed them to take by means of a declaration of trust, § 24.

§ 168. The reason given for the non-assignability of guardianship of infants will vary according as we read, Quia non videtur lucrosa, or, Quia non videtur onerosa. In English jurisprudence guardianship is said not to be capable of assignment or transfer, because it is not a right but a duty.

§ 172. The question whether a guardian was statutory or fiduciary might be of importance, as it affected the rights of the ward, § 194. It is clear that the natural father was statutory, not fiduciary, guardian, for it is incredible that the remancipation to the natural father, § 134, was accompanied by a fiducia. The sons of the natural father might have been expected to become statutory guardians, like the sons of any other patronus, but we find that they were only deemed to be fiduciary guardians, § 175. Justinian assigns as a reason why the sons were only fiduciary guardians the fact that a slave, if not manumitted by the father, would have become the slave of the sons, Inst. 1, 19; from whence we may conclude, if his reasoning is logical, that a bondsman, if not manumitted, would not become the bondsman of the son of his lord: in other words, that the death of the father extinguished the status of bondage. But I am not aware that this incident of bondage is elsewhere mentioned; and if it explains why the son of the emanci-

pator could not become statutory guardian, it leaves unexplained why he became fiduciary guardian.

DE PETENDO ALIO TUTORE.

§ 173. Praeterea senatusconsulto mu*li*eribus permissum est in absentis tutoris locum alium petere: quo petito prior desinit. nec interest quam longe aberit is tutor.

§ 173. Moreover, a decree of the senate permits female wards to demand a substitute in the place of an absent guardian, and the appointment of a substitute supersedes the previous guardian, and the length of his absence is immaterial.

§ 174. Set excipitur, ne in absentis patroni locum liceat libert*ae* tutorem petere.

§ 174. But an exception is made in favour of an absent patron, who cannot be superseded on the application of a freedwoman.

§ 175. Patroni *au*tem loco habemus e*tiam* paren*tem* qui i*n e mancipio* sibi remancipatam filiam neptemve aut proneptem manumissione legitimam tutelam nanctus est. huius quidem liberi fiduciarii tutoris loco numerantur: patroni autem liberi eandem tutelam adipiscuntur, quam et pater eorum habuit.

§ 175. Ranked with patrons is the parent who by mancipation, remancipation, and manumission of a daughter, granddaughter, or great-granddaughter, has become her statutory guardian. His sons only rank as fiduciary guardians, unlike a patron's sons, who succeed to the same form of guardianship as vested in their father.

§ 176. *Sed ad certam quidem causam* etiam in patroni absentis locum *permisit senatus* tutorem petere, veluti ad hereditatem adeundam.

§ 176. For a special and limited purpose the senate permits even a patron in his absence to be superseded by a substitute; for instance, to authorize the acceptance of an inheritance.

§ 177. Idem senatus censuit et in persona pupilli patroni filii.

§ 177. The senatusconsult gives similar permission when a patron's son is himself a ward.

§ 178. I*temque* lege Iulia de maritandis ordinibus ei quae in legitima tutela pupilli sit permittitur dotis constituendae gratia a praetore urbano tutorem petere.

§ 178. Before the senatusconsult the lex Julia regulating the marriages of the various orders, when a patron's son who was statutory guardian of a woman was himself a ward, permitted the woman to apply to the praetor of the city to substitute a guardian for the purpose of effecting a settlement of her dower.

§ 179. Sa*ne* patroni filius etiamsi inpubes sit, liber*tae efficietur* tu*t*or, *at* i*n nu*lla *re* a*uct*or fieri potest, cum ipsi nihil permissum sit sine tutoris auctoritate agere.

§ 179. For a patron's son even before the age of puberty is a freedwoman's guardian, but unable to authorize any proceeding, being himself disabled from acting without his guardian's authorization.

§ 180. Item si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendae gratia tutorem petere.

§ 180. Also, a woman whose statutory guardian is a lunatic or dumb is permitted by the senatusconsult, for the purpose of settling her dower, to apply for a substitutive guardian.

§ 181. Quibus casibus salvam manere tutelam patrono patronique filio manifestum est.

§ 181. In which cases the continued guardianship of the patron or patron's son is undisputed.

§ 182. Praeterea senatus censuit, ut si tutor pupilli pu*pill*ae*ve suspectus a tutela remotus sit, sive ex iusta causa fuerit excusatus, in locum eius alius tutor *detur*, quo *dat*o *pr*ior *tutor* ami*ttit* tutelam.

§ 182. The senate further decreed that if the guardian of a male or female ward is suspected of misconduct and removed from office, or if he alleges valid grounds for declining to act and is relieved of his functions, a substitute shall be appointed by the magistrate, and on his appointment the office of the former guardian shall determine.

§ 183. Ha*e*c o*mnia* similiter e*t* Rom*ae* *et in p*rovinc*ii*s so*lent obser*-*vari* . . . . si vero . . . .

§ 183. These rules are in force both in Rome and in the provinces.

§ 184. Olim cum legis actiones in usu erant, etiam ex illa causa tutor dabatur, si inter tutorem et mulierem pupillumve legis actione agendum erat: *nam* qu*ia* *ipse* qui*dem tutor* in re sua auctor esse non pot*erat*, *alius dabatur*, q*uo* *auct*o*re* i*lla* *legis* *act*io perager*etur*: qui dicebatur praetoriu*s* *tutor*, quia a praetore urbano dabatur. post sublatas legis actiones quidam putant hanc speciem dandi t*utoris non esse necessariam*; sed *adhuc dari* in *us*u *est*, *s*i *legit*imo iudi*cio* *ag*a*t*ur.

§ 184. During the era of litigation by statute-process [4 § 10], another cause of appointing a substitute was the imminence of statute-process between the guardian and the woman or ward; for as the guardian could not give his authority in respect of his own suit, another guardian was appointed to authorize the proceedings in the action, who was called a praetorian guardian, because he was appointed by the praetor of the city. Since the abolition of statute-process some hold this kind of guardian to be unnecessary, but the appointment is still customary on the occasion of a statutory suit. (4 § 103.)

§ 179. The law was changed by Justinian, who enacted that no one could become guardian who had not attained his majority, i.e. completed twenty-five years of age, Cod. 5, 30, 5.

§ 183. The ambiguity of the Latin language leaves it doubtful whether in the foregoing paragraphs, §§ 173, 176, 180, 182, Gaius refers to one or several senatusconsults. From D. 26, 1, 17, however, it appears that, complura senatusconsulta facta sunt ut in locum furiosi et muti et surdi tutoris alii tutores dentur: i.e. the

subject often occupied the attention of the senate. The reason was that the lex Atilia, presently mentioned, had received, after the wont of the ancient jurists, a strictly literal interpretation, and was not deemed to authorize the substitution of a guardian when the existing guardian was incapacitated.

DE ATILIANO TUTORE, ET EO QUI EX LEGE IULIA ET TITIA DATUR.

§ 185. Si cui nullus omnino tutor sit, ei datur in urbe Roma ex lege Atilia a praetore *u*rbano et maiore parte Tribunorum *p*lebis, qui Atilianus tutor vocatur; in provinciis vero a praesidibus provinciarum ex lege Iulia et Titia.

§ 185. Failing every other form of guardian, at Rome a guardian is appointed under the lex Atilia by the praetor of the city and the major part of the tribunes of the people, called an Atilian guardian: in the provinces, a guardian is appointed by the president of the province under the lex Julia and Titia.

§ 186. Et ideo si cui testamento tutor sub condicione aut ex die certo datus sit, quamdiu condicio aut dies pendet, tutor dari po*test;* item si pure datus fuerit, quamdiu nemo heres existat, tamdiu ex *i*is legibus tutor petendus est: qui desinit *t*utor esse postea q*uam* quis ex testamento tutor esse coeperit.

§ 186. Accordingly, on the appointment of a testamentary guardian subject to a condition, or on an appointment limited to take effect after a certain time, during the pendency of the condition and before the expiration of the term, a substitute is appointed by these magistrates; also, when the appointment of a testamentary guardian is not subject to a condition, so long as the succession has not vested, a temporary guardian may be obtained under those statutes, whose office will determine as soon as the testamentary guardianship has vested.

§ 187. Ab hostibus quoque tutore capto ex his legibus tu*tor* dat*ur*, qui desinit tutor esse, si is qui captus est in civitatem reversus fuerit: nam reversus recipit tutelam iure postliminii.

§ 187. On the hostile capture of a guardian the same statutes regulate the appointment of a substitute to continue in office until the return of the captive; for if the captive returns he recovers the guardianship in virtue of his rehabilitation.

§ 188. Ex *h*is apparet quot sint species tutelarum. si vero quaeramus, in quot genera hae species deducantur, lo*ng*a erit disputatio: nam de ea re valde veteres dubitaverunt, nosque di*l*igentius hunc tractatum exsecuti sumus et in edicti interpretatione, et in his libris

§ 188. The foregoing statement shows the various forms of guardian: the question of the number of orders to which these forms may be reduced involves a long discussion, for it is a point on which the ancient jurists differed greatly; and as I have examined it at length,

quos ex Quinto Mucio fecimus. hoc *solum* tantisper sufficit admonuisse, quod quidam quinque genera esse dixerunt, ut Quintus Mucius; alii tria, ut Servius Sulpicius: alii duo, ut Labeo; alii tot genera esse crediderunt, quot etiam species essent.

both in my interpretation of the edict and in my commentary on Quintus Mucius, for the present occasion it may suffice to observe that some, as Quintus Mucius, make five orders; others, as Servius Sulpicius, three; others, as Labeo, two; others make as many orders as there are forms of guardian.

A magisterially appointed guardian is called by modern commentators tutor dativus, a name used by Gaius in another sense, § 154; by the Romans he was called tutor Atilianus or Juliotitianus (*see* Theophilus), in memory of the statutes from whence the magistrates derived their power of nominating to the office of guardian. This power was not a portion of their inherent or immemorial attributions (imperium, jurisdictio): Tutoris datio neque imperii est neque jurisdictionis, sed ei soli competit cui nominatim hoc dedit vel lex vel senatusconsultum vel princeps, Dig. 26, 1, 6, 2. It was conferred on the praetor by the lex Atilia; on the praeses provinciae by the lex Julia et Titia. The lex Atilia is of uncertain date, but from Livy (post patroni mortem, quia nullius in manu esset, tutore a tribunis et praetore petito, 39, 9) it appears to have been older than 197 B.C. As there were ten tribunes, and the lex Atilia required the concurrence of the majority, the tutor Atilianus was nominated by the praetor and six tribunes. The lex Julia et Titia empowering the praeses provinciae to nominate a guardian is placed in the year 31 B.C.

In the time of Justinian the Atilian and Juliotitian guardian, not being compellable to act or to give security for the due discharge of their office, had fallen into desuetude, and in their stead guardians were appointed by the consul or praetor or praeses provinciae, after a special investigation (ex inquisitione). Justinian empowered the municipal magistrate called defensor civitatis, with the assistance of the bishop, to appoint guardians, taking securities for the due discharge of their office, whenever the fortune of the ward was under 500 golden solidi; a golden solidus being between a sovereign and a napoleon, i. e. 22½ francs, in value. Guardians appointed after inquest (ex inquisitione) were not required to give security for due administration, Inst. 1, 20, 3.

§ 188. In the time of Justinian there were three forms of guardian,—testamentary, or appointed by will; statutory, or prescribed

by the law in case of intestacy; and magisterial (dativus), or appointed by the magistrate, in default of a testamentary or statutory guardian. The other forms of guardian had become obsolete in consequence of the changes in legislation.

DE MULIERUM TUTELA.

§ 189. Sed inpuberes quidem in tutela esse omnium civitatium iure contingit; quia id naturali rationi conveniens est, ut is qui perfectae aetatis non sit alterius tutela regatur. nec fere ulla civitas est, in qua non licet parentibus liberis suis inpuberibus *testamento* tutorem dare; quamvis, ut supra diximus, soli cives Romani videantur tantum liberos in potestate habere.

§ 189. The wardship of children under the age of puberty is prescribed by every legislation, for it is a dictate of natural reason that persons of immature years should be under foreign guidance and control, and almost all states permit a parent to nominate a testamentary guardian for his children under the age of puberty, though, as we have before stated, only citizens of Rome appear to be invested with parental power.

§ 190. Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur. nam quae vulgo creditur, quia levitate animi plerumque decipiuntur, et ae*qu*um erat eas tutorum auctoritate regi, magis speciosa videtur quam vera. mulieres enim quae perfectae aetatis sunt ips*ae* sibi negotia tractant, et in quibusdam causis dici*s* gratia tut*or* interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur.

§ 190. But why women of mature years should continue in wardship there appears to be no valid reason; for the common allegation, that their weakness of judgment exposes them to the designs of the fraudulent, and that humanity requires them to be put under the control and authority of a guardian, seems rather specious than true, for women above the age of puberty administer their own property, and it is a mere formality that in some circumstances their guardian interposes his assent; in many others, if he refuses, he may be compelled to withdraw his opposition by an appeal to the praetor.

§ 191. Unde cum tutore nullum ex tutel*a* iudicium mulieri datu*r*: at ubi pupillorum pupillarumve negotia tutores tractan*t*, *eis* post pubertatem tutelae iudici*o* rationem reddunt.

§ 191. Accordingly, a guardian is not suable on account of administration by a woman in wardship; whereas the guardian of an infant, male or female, is liable to be sued on account of his administration as soon as the ward attains to the age of puberty.

§ 192. Sane patronorum et parentum legitimae tutelae vim aliquam habere intelleguntur eo, quod

§ 192. The statutory guardianship of patrons and parents is not purely illusory, as they cannot be

hi neque ad testamentum faciendum, neque ad res mancipi alienandas, neque ad obligationes suscipiendas auctores fieri coguntur, praeterquam si magna causa alienandarum rerum mancipi obligationisque suscipiendae interveniat. eaque omnia ipsorum causa constituta sunt, ut quia ad eos intestatarum mortuarum hereditates pertinent, neque per testamentum excludantur ab hereditate, neque alienatis pretiosioribus rebus susceptoque aere alieno minus locuples ad eos hereditas perveniat.

compelled to give their sanction to a will or to the alienation of mancipable property, or to the completion of a contract, unless there are very weighty reasons for the contract or the alienation; but this rule is in their own interest as heirs in intestacy, and is designed to prevent their loss of the estate by testamentary disposition, or the diminution of its value by debt or by alienation of a considerable portion.

§ 193. Aput peregrinos non similiter, ut aput nos, in tutela sunt feminae: set tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier contrahat, maritum auctorem esse iubet aut filium eius puberem.

§ 193. In other countries women are not under the same tutelage as at Rome, but are generally subject to a quasi tutelage: for instance, the law of Bithynia requires the contract of a woman to be sanctioned by her husband or by a son above the age of puberty.

As women were capable of administration, the functions of the guardian, which in the case of infants were either administrative or sanctionative, in the case of women were confined to sanctioning. Pupillorum pupillarumque tutores et negotia gerunt et auctoritatem interponunt: mulierum autem tutores auctoritatem dumtaxat interponunt, Ulp. 11, 25. It is transparent that the wardship of women after the years of puberty was not designed to protect their own interests, but those of their heirs apparent, their agnates. Originally the authorization of the guardian was not sufficient to validate the will of an independent woman: it was necessary that she should first break the ties of agnation, and separate from her family by means of a coemption (with her guardian's sanction) and subsequent remancipation and manumission. She then, with the sanction of the manumissor, in his character of fiduciary guardian, could make a valid will. In the time of Gaius, Hadrian having abolished the necessity of coemption, to make a valid will an independent woman only required the sanction of her guardian, 2 § 112.

When a woman was liberated from the control of her guardian, the simplest course would have been to declare her dispositions valid without his sanction—to declare her no longer a ward. But with characteristic conservatism of forms, the Roman legislator, to avoid

the open change, declared the auctoritas still necessary, but made it compulsory instead of voluntary—gave the ward a power of extorting it from the guardian. So the act whereby a testamentary heir accepts an inheritance was originally absolutely voluntary: but when trusts (fidei commissa) were introduced, and the heir as trustee or fiduciarius by groundlessly refusing to make the necessary aditio, which in this case was the merest form, could produce intestacy, and thus deprive the beneficiary, fideicommissarius, or cestui que trust of the provision destined for him by the bounty of the testator: instead of declaring the aditio of the heres unnecessary to the acquisition of the fortune by the fideicommissarius; or that in such a case the beneficiary should be deemed to be a direct substitutus of the heres; or that the vexatious refusal of the heres should be deemed to be an aditio and restitutio; the legislator ordained that the heres should be compelled to make aditio in order to complete the title, 2 § 258. Again, the terms of the security given by the guardian (rem pupilli salvam fore) against dilapidation of the estate of the ward made the responsibility of the guardian depend on his actual administration; so that he was not responsible if the estate went to ruin in consequence of his total abstention from the performance of his duties. To protect the ward against this contingency, instead of altering the formula of the satisdatio, and making the liability of the guardian depend on his appointment and not on his acting; the legislator compelled him to proceed to some act of guardianship, in order to bring him under the unchanged terms of his security. In all these and other cases a compulsory act was substituted for a voluntary act for the sake of giving the law an outward appearance of antiquity. At last, at some period before the epoch of Justinian, the tutelage of women above the age of puberty had ceased in form as well as in substance, and no sanction of a guardian, whether voluntary or compulsory, was required. Ihering.

It is to be observed, that as women were gradually enfranchised from their disabilities, they also forfeited some of their original privileges. It was a rule of the administration of justice that while error of fact might be pleaded to defend a person against the consequences of his own acts or omissions, no one should be allowed to allege an error of law, Dig. 22, 6, 9. An exception however was made in favour of minors, of soldiers, of the utterly uneducated (rustici), and of women. Against their ignorance of rules of law,

particularly those rules of Civil law which are not, like rules of Gentile law, the almost self-evident dictates of reason and common sense, they were relieved by a branch of the praetor's equitable jurisdiction, called integri restitutio, a power of cancellation and rescission, in cases of manifest collision between law and equity. This privilege of women was partially abrogated by a constitution of the Emperor Leo, A.D. 469: Ne passim liceat mulieribus omnes suos contractus retractare, in his quae praetermiserint vel ignoraverint: statuimus si per ignorantiam juris damnum aliquod circa jus vel substantiam suam patiantur, in his tantum casibus in quibus praeteritarum legum auctoritas eis suffragatur, subveniri, Cod. 1, 18, 13. 'To prevent the indiscriminate revocation by women of all their contracts on the ground of omission or error, be it enacted, that ignorance of law, whereby a woman is damnified in her right or property, shall only be a title to relief in those cases where women have heretofore been expressly excepted from the provisions of any statute.'

QUIBUS MODIS TUTELA FINIATUR.

§ 194. Tutela autem liberantur ingenuae quidem trium *liberorum iure, libertinae vero quattuor, si in patroni* liberorumve eius legitima tut*ela* sin*t*. nam et ceterae quae alterius generis tutores habent, velut Atilianos aut fiduciarios, trium liberorum iu*re liberantur*.

§ 194. Guardianship terminates for a freeborn woman by title of maternity of three children, for a freedwoman under statutory guardianship by maternity of four children: those who have other kinds of guardians, Atilian, for instance, or fiduciary, are released from wardship by title of three children.

§ 195. *Potest* autem pluribus modis *libertin*a alterius generis habere, veluti si a femina manumissa sit: tunc enim e lege Atilia petere debet tutorem, vel in provincia *e lege Iulia et Titia*: *nam* patronae *tutelam libertorum suorum libertarumve gerere non possunt. Sed et si sit a masculo* manumissa, et auctore eo coemptionem fecerit, deinde remancipata et manumissa sit, patronum quidem habere tutorem desinit, incipit autem habere eum tutorem a quo manumissa est, qui fiduciarius dicitur. Item si patron*us sive filius eius* in adoptionem se dedit, debet *sibi e lege Atilia vel Titi*a tutorem

§ 195. There are various modes by which a freedwoman may have the other kinds of guardian: for instance, on manumission by a woman, when she must request a guardian under the lex Atilia, or in the provinces under the lex Julia and Titia, as a female patron cannot be guardian to a freedman or freedwoman: also on manumission by a male, if with his sanction she makes a coemption, and then is remancipated and manumitted, for the patron then ceases to be guardian, and is replaced by the second manumitter, who is called a fiduciary guardian. Also on the adrogation of her patron or his son

petere. Similiter ex *i*isdem legibus petere debet tutorem *libert*a, si patronus decedit nec ullum virilis sexus liberorum in familia re*lin*-*qu*it.

she must demand a guardian under the lex Atilia or Titia, and in compliance with the same laws she must demand a guardian on the decease of her patron without leaving any son in the family.

§ 196. M*asculi quando* puberes esse coeperint, tutela liberantur. *Puberem autem Sabinus* quidem *et Cassius ceterique nostri praeceptores* eum esse putant qui habitu corporis pubertatem ostendi*t, hoc est* qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam aetatem esse spectandam, cuius aetatis puberes fiunt. sed diversae sc*h*olae auctores annis putant pubertat*e*m aestimandam, id est eum puberem esse ex*istimandum, qui* XIIII. *annos explevit*—[24 *lineae.*]

§ 196. For males the attainment of the age of puberty is a release from wardship. Puberty, according to Sabinus and Cassius and the other authorities of my school, depends on physical development, that is, on capacity of generation; or in case of impotence on the completion of [eighteen years, or] the age which even in the latest constitutions usually implies capacity of generation. The other school hold that puberty is to be exclusively measured by age, that is to say, that it should always be deemed to be attained on the completion by a male of his fourteenth year.

§ 196. All jurists agreed that in the case of the spado (natural impotence) some fixed date must be assumed as the conventional period of puberty. The Sabinian rule appears to be preserved in a passage of Paulus: Spadones eo tempore testamentum facere possunt quo plerique pubescunt, id est, anno decimo octavo, 3, 4 *a*, 2. 'In cases of natural impotence testamentary capacity is acquired at the age which almost always (even in the tardiest developments) marks generative capacity, namely, eighteen years completed.' Fourteen was assumed to be the average age of puberty; but it was too early, even in the southern climes subject to Roman legislation, for a minority of constitutions which advance more slowly to maturity. Eighteen was supposed to be sufficiently postponed to include most of these cases of retarded development. We have already, in treating of adrogation, § 106, commentary, met with the phrase, plena pubertas, denoting eighteen years of age. We may suspect that in Paulus we should read, quo plerique pubescunt qui tardius pubescunt; and in Gaius, cujus aetatis puberes fiunt qui tardius puberes fiunt; the similarity of ending having caused the omission of the clauses by the transcribers.

This paragraph is the first which refers to the existence of rival schools among the Roman juris auctores, to which we shall find

frequent allusions in the remainder of the treatise. This divergence of the schools dates from the first elevation of the jurist to a species of public functionary, namely, from the reign of Augustus, in whose time, as we have seen, § 7, commentary, certain jurists began to be invested by imperial diploma with a quasi legislative authority. In his reign the rival oracles were Antistius Labeo and Caius Ateius Capito: Hi duo primum veluti diversas sectas fecerunt, Dig. 1, 2, 47. 'The first founders of the two opposing sects.' From Labeo's works there are 63 extracts in the Digest, and Labeo is cited as an authority in the extracts from other jurists oftener than any one else except Salvius Julianus. From Sempronius Proculus, a disciple of Labeo, and of whom 37 fragments are preserved in the Digest, the school derived its name of Proculiani. Other noted jurists of this school were Pegasus, in the time of Vespasian; Celsus, in the time of Domitian, who gave rise to the proverb, responsio Celsina, a discourteous answer, and of whom 142 fragments are preserved; and Neratius, of whom 64 fragments are preserved. To the other school belonged Masurius Sabinus, who flourished under Nero, and from whom the sect were called Sabiniani. Sabinus is mentioned by Persius:—

> Vindicta postquam meus a praetore recessi,
> Cur mihi non liceat jussit quodcunque voluntas,
> Excepto si quid Masuri rubrica vetavit?—5, 90.

'Touched by the enfranchising wand, I came my own master from the praetor's court. What hinders me to follow the dictates of my will, except where the Masurian rubric has forbidden?' To the same school belonged Caius Cassius Longinus, who flourished under Nero and Vespasian, and from whom the sect are sometimes called Cassiani: Javolenus Priscus, of whom 206 fragments are preserved: Salvius Julianus, who reduced the praetorian edict to a permanent form in the reign of Hadrian, and of whom 457 fragments are preserved: Pomponius, of whom 585 fragments are preserved: Sextus Caecilius Africanus, celebrated for his obscurity, so that Africani lex in the language of lawyers meant lex difficilis, of whom 131 fragments are preserved: and, lastly, our author, Gaius, who flourished under Hadrian, Antoninus Pius, and Marcus Aurelius, and from whose writings 535 extracts are to be found in the Digest.

If we now inquire whether this divergence of schools was based

on any difference of principle, the answer is, No: on none, at least, that modern commentators have succeeded in discovering: it was merely a difference on a multitude of isolated points of detail. We are told indeed that the founders were men of dissimilar characters and intellectual dispositions: that Labeo was characterized by boldness of logic and a spirit of innovation; while Capito rested on tradition and authority, and inclined to conservatism, Dig. 1, 2, 47; but it is altogether impossible to trace their opposing tendencies in the writings of their successors: and we must suppose that the intellectual impulse given by Labeo was communicated to the followers of both schools of jurisprudence. But though, as we have stated, no difference of principle was involved, each school was accustomed to follow its leaders with much servility; and it is quite an exception to find, on a certain question, Cassius, a member of the Sabinian school, following the opinion of Labeo; while Proculus, who gave his name to Labeo's school, preferred the opinion of Ofilius, the teacher of Capito, 3 § 140.

We may briefly mention some of the most illustrious jurists who flourished subsequently to the era of Gaius. Aemilius Papinianus flourished under Marcus Aurelius and Septimius Severus, and was murdered by the order of Caracalla: 595 extracts from his writings are contained in the Digest. It was perhaps due to the transcendent genius, or at least to the extraordinary reputation, of Papinian, which made him seem too great to be reckoned any man's follower, that we cease henceforth to hear of opposing schools of jurisprudence. Papinian appears to have been stationed at York, with the function of praefectus praetorio, so that England may claim some slight connection with the brightest luminary of Roman law.

A disciple and colleague of Papinian was Domitius Ulpianus, murdered by the praetorian soldiery, whose domination he resisted, in the presence of the Emperor Alexander Severus: 2462 fragments, composing about a third of the whole Digest, are taken from his writings. An epitome of his Liber Singularis Regularum is still extant in a manuscript of the Vatican Library, and is the work referred to when, without mentioning the Digest, we cite the authority of Ulpian.

Another disciple and colleague of Papinian was Julius Paulus, of whose writings 2080 fragments are preserved in the Digest, forming about a sixth of its mass. An epitome of his treatise called Sen-

tentiae Receptae is found in the code of Alaric 2, king of the Visigoths; and it is to this book that we refer when we simply cite the authority of Paulus.

A disciple of Ulpian's was Herennius Modestinus, of whom 345 extracts are contained in the Digest. After Modestinus the lustre of Roman jurisprudence began to decline.

In what did the relation of disciple and teacher (praeceptor) consist? Principally in this, that a jurist of eminence allowed youths who aspired to a knowledge of the law to attend in his chambers and hear the advice which he gave to his clients. Jus civile docere semper pulchrum fuit, hominumque clarissimorum discipulis floruerunt domus, Cic. Orator. 41. 'To instruct in law was always honorable, and eminent jurists have ever had crowds of disciples to grace their chambers.' Cicero himself had been introduced in his youth to Qu. Mucius the augur, and learnt law in his auditory, Laelius, 1. Three terms are used to indicate three stages of legal education: instituere, audire, instruere: Servius plurimum eos de quibus locuti sumus audivit, institutus a Balbo Lucilio, instructus autem maxime a Gallo Aquilio, Dig. 1, 2, 43. 'Servius was long an auditor of all these jurists: his education was commenced by Lucilius, and completed by Aquilius.' Instituere is to initiate in the elements of law, to lay the foundations of juridical knowledge. After completing this stage, the student was allowed to attend in the auditorium of a jurist and hear the oracles he delivered on consultation. Instruere denoted a closer intimacy and longer communication, and gave the learner the name of the praeceptor's studiosus. The first two processes seem contrasted in the following passage of Cicero: Qu. Scaevola quanquam nemini se ad docendum dabat, tamen consulentibus respondendo studiosos audiendi docebat, Brutus, 89. 'Scaevola gave no lessons in jurisprudence, but his answers to clients were instructive to his auditors.' Ulpian calls Modestinus, studiosus meus, Dig. 47, 2, 52, 20. That studiosus was not a mere student appears from many passages: Divus Antoninus Pius rescripsit: juris studiosos, qui salaria petant, haec exigere posse, Dig. 50, 13, 4. 'The Emperor Pius ruled that barristers (apprentices) can recover their fees (by the praetor's cognitio extraordinaria).' Deinde instituit ut ingratorum in principem testamenta ad fiscum pertinerent, ac ne impune esset studiosis juris, qui scripsissent vel dictassent ea, Suetonius, Nero, 32. 'Nero enacted that the successions of persons ungrateful to the emperor

should be confiscated, and made it penal in a lawyer to write or dictate an ungrateful will.' Cur, inquit, hoc me potius rogas, quam ex istis aliquem peritis studiosisque juris, quos adhibere in consilium judicaturi soletis? Gellius, 12, 13. 'Why do you not consult one of the lawyers who would sit as your assessor if you were judex?' Probably every lawyer was called a juris studiosus until by imperial diploma he had received the jus respondendi which made him a juris auctor.

At a later period we find that institution or preparatory tuition in law was undertaken by private teachers, who made this a special occupation. They are alluded to by Ulpian under the name of juris civilis professores, Dig. 50, 13, 1, 5. They were called professors because they were required to declare (profiteri) their intention before some competent authority, from whom they received permission to pursue their vocation, and they became thereupon entitled to certain privileges accorded to the professors of a liberal art. They appear to be distinguished from the practising lawyers in the following passage from Gellius, a contemporary of Gaius: Quaesitum esse memini in plerisque Romae stationibus jus publice docentium aut respondentium, an quaestor populi Romani a praetore in jus vocari posset, 13, 13. 'The question was canvassed in nearly all the rooms of the law professors, and nearly all the chambers of the jurists at Rome, whether a quaestor could be summoned by a praetor to his court:' where the stationes or standing places of the professors and jurists may remind us of the ancient custom of the English sergeants of meeting their pupils and clients at certain pillars in the church of St. Paul's.

In the time of Justinian we find professors in the modern sense, and academic instruction in three public schools of law at Rome, Constantinople, and Berytus. In a constitution addressed to the professors (antecessores), and prefixed to the Digest, Justinian modifies the existing plan of studies, and prescribes what portion of the Institutions, Digest, and Code is to be studied in each year of the quinquennial course.

DE CURATORIBUS.

§ 197. . . . . . aetatem pervenerit in qua res suas tueri possit. idem aput peregrinas gentes custodiri superius indicavimus.

§ 197. After release from wardship the estate of a minor is managed by a curator until he reaches the age at which he is competent

to administer his own affairs, and the same rule obtains in other nations, as we have already mentioned.

§ 198. Ex iisdem causis et in provinciis a praesid*i*bus earum curatores dari voluit.

§ 198. Under similar circumstances the president of a province appoints a curator by the constitution of Marcus Aurelius.

DE SATISDATIONE TUTORUM VEL CURATORUM.

§ 199. Ne tamen et pupillorum et eorum qui in curatione sunt negotia *a* tutoribus curatoribusque consumantur aut deminuantur, curat praetor, ut et tutores et *curatores* eo nomine satisdent.

§ 199. To protect wards and minors from the destruction or waste of their property by guardians and curators, it is the function of the praetor to require guardians and curators to give security for due administration.

§ 200. Set hoc non est perpetuum. na*m* et tutores testamento dati satisdare non coguntur, qui*a* fides eorum et diligentia ab ipso testatore probata est; *et cu*ratores ad quos non e lege curatio pertinet, set *qui* vel a consule vel a praetore vel a praeside provinci*ae dan*tur, plerumque non coguntur satisdare, scil*i*cet quia satis i*donei electi* sunt.

§ 200. But this is not without exception, for testamentary guardians are not compelled to give security, as their integrity and vigilance have been approved by the testator; and curators who have not been appointed by any statute, but by the nomination of a consul or praetor or president of a province, are generally not required to give security, their selection being deemed sufficient evidence of their trustworthiness.

In English jurisprudence there is no distinction corresponding to that between tutor and curator, infant (impubes) and minor (adolescens). Infant and minor are in English synonymous: guardianship continues to the attainment of majority, i. e. to the completion of 21 years of age; and after that the young of both sexes are considered to be capable of taking care of themselves, and are free from further control. At Rome wardship (tutela) ceased at the age of 14 for males and 12 for females, ages at which the young manifestly continue to stand in need of guidance and protection.

Such protection was provided for them partly by two statutes, partly by praetorian legislation. (1) The lex Plaetoria was as old as Plautus, who makes a youth exclaim: Tum lex me perdit quinavicenaria; metuunt credere omnes, Pseudolus, 1, 3, 69. 'The statute with its five and twenty years prevents my getting credit.'

It made a criminal offence, and subject to a criminal prosecution (judicium publicum, Cic. De Nat. Deor. 3, 30), what Cicero calls circumscriptio adolescentium, De Off. 3, 15; i. e. overreaching and circumventing persons below the age of 25. Such is Savigny's interpretation of judicium publicum, Vermischte Schriften, 18. Ihering maintains that judicium publicum denotes in this passage not a criminal prosecution but an actio popularis; i. e. a civil action that could be instituted not only by the Minor but by a common Informer: and he quotes D. 26, 10, 1, 6: Consequens est ut videamus qui possint suspectos (tutores) postulare, et sciendum est quasi publicam esse hanc actionem, hoc est, omnibus patere, and D. 12, 2, 30, 3, where publica actio means actio popularis, Geist des Römischen Rechts, § 52. The circumscription of a minor, like maladministration by a guardian, rendered the person convicted thereof infamis. The statute provided, apparently, that a contractor with a minor might secure himself against the penalties of the law, if a curator were nominated by the praetor to advise the minor in respect of the special transaction.

(2) As the lex Plaetoria was only applicable in cases of fraud (dolus malus, Cic. De Off. 3, 15), the protection it gave to minors was inadequate: accordingly, the praetor proclaimed in his edict that he would relieve minors who had been damaged in consequence of inexperience and improvidence by rescission and cancellation of the proceeding (in integrum restitutio). To obtain this relief it was not necessary to prove any fraud on the part of the person who contracted with the minor.

(3) A person who wished to bring an action against a minor could compel him to obtain from the praetor a curator for the purpose of defending the particular suit; whose office ceased as soon as the special litigation terminated. Marcus Aurelius, under whom Gaius flourished, enacted that any minor who chose should be able to obtain from the praetor a general curator (generalis curator), who then should be charged with the general administration (generalis administratio) of his estate, Capitolinus, 10. In view of this option of the minor, Justinian could still say: Inviti adolescentes curatores non accipiunt praeterquam ad litem, Inst. 1, 23, 2. 'Unless they choose, minors need not have a curator, except for a suit.' A minor who had a curator could not aliene without the consent of his curator: he could incur an obligation without the consent of his curator, subject to his right of in

integrum restitutio. Even the existence of a curator did not deprive the minor of his right of restitution, but of course it could not be obtained so readily as when he acted without the advice of a curator.

The tutor and curator were entirely separate functionaries: when women were under perpetual tutelage, a woman might have both a tutor and a curator. The curator of a minor must be distinguished from an agent (procurator), a person invested with certain rights and duties, which will be explained when we examine the different kinds of contract. An agent is governed by the instructions (mandatum) of his principal: a minor is under the direction of his curator: the employment of an agent is a private matter, purely voluntary on the part of the principal; the curator is a public functionary, and having one is to a certain extent involuntary on the part of the minor.

Besides minors, lunatics and prodigals of whatever age were committed to the charge of curators. The curatio of lunatics and prodigals is, indeed, older than that of minors, being regulated by the Twelve Tables, which directed that the nearest agnate should be committee of a lunatic, and manage the estate of an interdicted prodigal. In later times it was usual for the praetor or praeses provinciae to appoint a curator after inquest (ex inquisitione). Paulus has preserved the form of words in which the prodigal was interdicted: Moribus per praetorem bonis interdicitur hoc modo: Quando tu bona paterna avitaque nequitia tua disperdis, liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdico, 3, 4 *a*, 7. 'By customary law the praetor interdicts a prodigal from the administration of his property in the following terms: As thy profligacy is wasting the estate of thy father and ancestors, and bringing thy children to destitution, I therefore interdict thee from the control of thy patrimony, and from all disposition of property.'

From § 189 it might appear that Gaius referred the institution of guardianship to the code of Jus Gentium. We have, however, quoted from the Digest, § 142, a passage which ascribes it to Jus Civile: and, indeed, no institution containing numerical definitions (fixing, for example, on 12 and 14 for the years of puberty of the two sexes, and 25 for the year of majority of both sexes, without regard to individual development of intelligence) can be supposed to belong to natural law, if natural law is the less arbitrary element

of the positive code. Moreover, the law of guardianship has been most variable, not only if we look to different countries, but also if we look at different periods in the same country; and the praetor or chancellor or other authority that has had the supervision of guardians has always exercised a great latitude of discretion; features which again forbid us to ascribe the rules of wardship to any comparatively immutable code of nature. A striking illustration and proof of the civil character of the rules of wardship in Roman law is furnished by the fact that though a promise by a ward without his guardian's authority has no binding force, i. e. produces no civilis obligatio, in other terms is not actionable, except so far as he is thereby enriched; yet, irrespectively of the gain or loss of the ward, Roman jurisprudence recognized that his promise produced a naturalis obligatio, for it ruled that such promise might be the basis of a suretyship, 3 § 119, and might extinguish a previous debt by novation, 3 § 176; and both suretyship and novation are institutions which are essentially accessary; that is to say, each implies the existence of two distinct obligations, either civil or natural, one assuring and the other assured, or one transforming and the other transformed. If wardship had been regarded as a natural or gentile institution, then the promise of the ward, having no validity by the gentile code (naturalis obligatio), would have been incapable of being confirmed by suretyship or transformed by novation.

In integrum restitutio, a branch of the praetor's equitable jurisdiction, and one of the most remarkable cases of his cognitio extraordinaria, has been mentioned more than once, and deserves here a brief explanation. Restituere in a general sense denotes any undoing of a wrong, any replacement of a person or his right in his or its original condition, whether by the voluntary act of the wrongdoer, or after action brought, and then either at the invitation of the judge (in virtue of the clause, ni restituat, 4 § 47), or in execution of a judicial sentence. But in the phrase we are examining it denotes the act, not of a private party, but of a judicial authority. In integrum restitutio is the restitution by the praetor of a person or his right to his or its original uninjured condition, in cases when no remedy is to be obtained either from the rigorous rules of the civil law or jus strictum (e. g. by civilis actio), or even from equity as administered by the ordinary judges in the ordinary forms (e. g. by exceptio or bonae fidei actio). The inter-

position in such cases of the highest Roman minister of justice resembles that of the English chancellor when a suitor is unable to obtain redress by the rules and forms of the courts of common law. The function of overruling the ordinary course of law where it collided with equity was only confided to the highest judicial authority, and even in his hands was governed, at all events in later times, by precise rules of positive law. Five grounds or titles (justae causae) to extraordinary relief (extraordinarium auxilium) were recognized and enumerated in the edict, Dig. 4, 1: intimidation (metus), fraud (dolus malus), absence, error, minority (aetatis infirmitas). Two, however, of these titles, fraud and intimidation, had additional remedies in the ordinary course of procedure (ordo judiciorum), where they were recognized as grounds of exception and personal action. First a praetor called Cassius introduced the exceptio doli, D. 44, 4, 4, 33. Then a praetor called Octavius introduced the actio and exceptio metus mentioned by Cicero, Verr. 2, 3, 65, where the actio metus is called Formula Octaviana. Lastly Aquilius, colleague of Cicero, introduced the actio doli, Cic. de Natura Deorum 3, 30.

The chronological order of the remedy by Action and the remedy by Restitution is disputed. Savigny holds that the remedy by Restitution was older than the remedy by Action, § 112, § 191, § 199; while Vangerow holds that the remedy by Action was older than the remedy by Restitution, § 185. The latter opinion seems more consistent with the statement of Cicero, De Off. 3, 14.

There are three conditions of Restitution: (1) The first condition is a Laesion by the operation of civil law, i. e. a disadvantageous change in civil rights or obligations brought about by some omission or disposition of the person who claims relief. This disadvantage may either consist in positive loss of acquired property, or in missing a gain which would not have involved, on the part of another, a positive loss of acquired property. An instance of such a laesion would be the loss of property by omitting to interrupt a usucapio, or by omitting to claim a succession (aditio, agnitio), or by entering into a foolish bargain.

(2) A second condition is some special or abnormal position of the person who claims relief when such special circumstance is the cause of the loss which he has suffered. Thus a minor may be relieved against an injudicious bargain, but not against the

casual destruction of the thing he has purchased, for this loss was not occasioned by his minority or inexperience. Such abnormal positions (justae causae) are compulsion, fraud, minority, absence, error.

(3) A third condition of relief is the absence of various disentitling circumstances. Thus relief is granted against the effect of lawful omissions or dispositions, but not against the effect of delicts; at all events not of dolose or intentional delicts, but only of culpose delicts, i. e. of torts committed from negligence. Again the extraordinary relief of in integrum restitutio is not granted when the courts of civil law can administer an adequate remedy.

Originally capitis minutio of a defendant was ground for a restitution, 3 § 84; but this ceased at an early period to be a genuine case of restitution; for rescission of the adrogation, adoption, emancipation, whereby a person's debts were extinguished, was granted as a matter of course without any previous investigation (causae cognitio), and without any period of prescription like that which limited the right to pray for restitution.

This was, originally, annus utilis, and in the time of Justinian, quadriennium continuum or 4 calendar years (3 § 117, commentary), which begin to run, not from the date of the Laesion, but from the termination of the Causa, i. e. the abnormal position—minority, absence, compulsion, deception, error—whereby the Laesion was occasioned. Such at least is Savigny's opinion. Vangerow holds that, except in Minority and Absence, prescription begins to run from the date of Laesion, § 181.

Of the five titles to restitution that we have enumerated, four, namely, intimidation, fraud, absence, error, implying equality of rights in all parties, belong to the law of Things; title by minority, implying a privileged class or inequality of rights, belongs to the law of Persons.

As we shall have occasion in the next book to use the expression Rerum universitas, it may seem appropriate, before we quit the law of Persons, to give some Explanation of the contrasted term, Personarum universitas. A University of persons in the private code is a fictitious or juristic person, composed generally by the union of a number of individuals, and capable like a natural individual (singularis persona) of the various rights and duties of property, that is to say, of dominium, servitus, potestas, patronatus, colonatus, obligatio; and the power of suing and being sued.

Some Universities have a visible existence in a number of individual members, and are then called Corporations. An essential incident of Corporations is that their rights are not vested in the aggregate of individuals, but in the ideal whole, regarded as distinct from the members of which it is composed. Examples of such Corporations are municipalities (civitas, municipium, respublica, communitas), colleges of priests, of Vestal Virgins, corporations of subordinate officials, e. g. lictors, notaries (scribae, decuriae), industrial guilds, e. g. smiths, bakers, potters, shipowners, mining companies (aurifodinarum, argentifodinarum, salinarum, societas), contractors for the revenue (vectigalium publicorum societas), social clubs (sodalitates, sodalitia), friendly societies (tenuiorum collegia).

Other juristic persons, not so visibly embodied in any natural individuals, e. g. churches, hospitals, almshouses, or any other beneficent aims personified, are called, not Corporations but, Foundations.

The state as a juristic person, invested with rights of property, was called in the time of the republic Ærarium. Under the first emperors, when the public treasure was divided between the emperor and the senate, the senate, as a juristic person representing the republic, was called Ærarium, while the emperor was called Fiscus. At an uncertain date, about the time of Gaius, when all power was undisguisedly absorbed by the emperor, and the public chests were united, the terms Ærarium and Fiscus lost their distinctive meanings, and we find them used convertibly in the compilations of Justinian.

Juristic persons, though invested with rights of property, being mere fictions or ideal unities, are incapable of making a disposition (declaration of intention); for how can a fiction have an intention? It is true that slaves could acquire property and active obligations for their proprietors; but a slave could not aliene property, nor incur a passive obligation, nor enter into a bilateral contract, nor be a party to a suit: and therefore Universities could not make such dispositions by means of their slaves. In this respect they resemble infants and lunatics; and as infants and lunatics must be represented by their guardians and curators, so juristic persons must be represented by the agents designated and defined by their constitution. The temporary representative of a Corporation for the purpose of suing and being sued, was called Actor; a permanent representative for this purpose was called Syndicus, D. 3, 4, 1. The

constitutions of juristic persons are too various to admit of any general definition. In towns the supreme direction and representation belonged to the Senate (curia, ordo). A meeting of two-thirds of the whole number of members represented the whole senate, and the vote of the majority in such a meeting was the decision of the senate.

Although a Universitas is said to hold common property, the relation of the members of a Universitas must not be identified with that of Coproprietors (communio). A coproprietor is the separate proprietor of an undivided ideal portion, which he can aliene, mortgage, and otherwise dispose of; and which, by requiring a partition (actio communi dividundo), he can always reduce to a real portion: whereas the whole of the common property can only be dealt with if the coproprietors are unanimous. Members of a Universitas, on the contrary, cannot demand a partition; and dispositions of the property of the Universitas can only be made, and can always be made, by the vote of a majority of two-thirds of the members.

Every juristic person was originally incapable of being instituted successor (heres), as Pliny mentions in the case of municipalities: Nec heredem institui nec praecipere posse rempublicam constat. Epist. 5, 7. 'Neither successions nor legacies by praeceptio (which imply that the legatee is also heir, 2 § 217) can be left to a town.' Juristic persons were not subject to this incapacity because they were personae incertae, 2 § 238, for they are personae certae, but because, being fictions, they were incapable of aditio, which involves intention, and excludes representation. First the senate, disregarding this difficulty, allowed municipalities to be instituted successors by their own liberti, Ulpian 22, 5, and subsequently the Emperor Leo, A. D. 469, gave to municipalities the capacity of being instituted successor by any testator, Cod. 6, 24, 12. No general enactment extended this capacity to all Corporations, but some received it as a special privilege.

Originally towns, like other juristic persons, were incapable of taking bequests (legata), but subsequently towns were declared capable by Nerva and Hadrian, Ulpian 24, 28; Gaius 2 § 195: and this capacity was extended to Collegia and Templa, D. 34, 5, 20, and probably to all juristic persons. Towns were also capable of taking successions by fideicommissum, Ulpian 22, 5.

Under Christian legislation Pious Foundations (pia corpora) were made capable of taking hereditas and legatum: and devises of

hereditas and legatum, that would otherwise have been void by the rule avoiding devises to incerta persona, e. g. a devise to the poor of a town who, not forming a corporation, were not persona certa, acquired validity from the pious purpose of the disposition.

Some juristic persons have special privileges; for instance, the Fiscus has privileges over other creditors. Sometimes the individual members have certain privileges; for instance, the rank of municipal senator (decurio) was hereditary and the senate formed a kind of caste.

The origin and extinction of a juristic person requires the assent of the sovereign. The special privileges and incapacities which we have indicated, by their analogy to status, may perhaps justify the mention of Universities in the law of Persons. Savigny, §§ 85–102.

BOOK II.

DE REBUS SINGULIS ET DE RERUM UNIVERSITATIBUS.

DE RERUM DIVISIONE.

§ 1. *Superiore commentario de iure personarum* exposuimus; modo videamus de rebus: *quae vel* in nostro patrimonio sunt, vel extra nostrum patrimonium habentur.

§ 1. In the preceding book the law of persons was expounded; now let us proceed to the law of things, which are either subject to private dominion or not subject to private dominion.

§ 2. Summa itaque rerum divisio *in duos articulos deducitur*: *nam aliae sunt divini iuris*, aliae humani.

§ 2. The first division of things is into two classes: things subject to divine dominion, and things subject to human dominion.

§ 3. Divini iu*ris* su*nt* velu*ti* res sac*rae* et religiosae.

§ 3. Subject to divine dominion are things sacred and things religious.

§ 4. Sacrae sunt quae Diis superis consecr*a*tae sunt; religiosae, quae Diis manibus relictae sunt.

§ 4. Sacred things are those consecrated to the gods above; religious, those devoted to the gods below.

§ 5. *Sed* sacrum *quidem solum* ex*ist*um*atu*r auctoritate *populi Romani fieri; consecratur enim lege de* ea re lata aut senatusconsulto fa*cto*.

§ 5. Sacred things can only become so with the authority of the people of Rome, by consecration in pursuance of a law or a decree of the senate.

§ 6. Religiosum vero nostra voluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat.

§ 6. A religious thing becomes so by private will, when an individual buries a dead body in his own ground, if the burial is his proper business.

§ 7. Set in provinciali solo placet plerisque solum religiosum non fieri,

§ 7. On provincial soil, according to most authorities, as the dominion

quia in *eo solo* dominium populi Romani est vel Caesaris, nos autem possessionem tantum *et u*sumfructum habere videmur. utique tamen *eiusmodi locus, licet non sit* religiosus, pro *religio*so *habetur,* quia etiam quod in provinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.

belongs to the people of Rome or the emperor, and individuals only have possession or usufruct, such places, though not properly religious, are quasi-religious; just as provincial soil, in default of the authorization of the people of Rome, is rendered by consecration not sacred, but quasi-sacred.

§ 8. Sanctae quoque res, velu*t* muri et portae, quodammodo divini iuris sunt.

§ 8. Sanctioned places are to a certain extent under divine dominion, such as city gates and city walls.

§ 9. Quod autem *divini* iuris est, id nullius in bonis est: id vero quod humani *iuris est plerumque alicuius in bonis est: potest autem et nullius in bonis esse. nam res hereditariae, antequam aliquis heres existat, nullius in bonis sunt.*

§ 9. Things subject to divine dominion are exempt from private dominion; things subject to human dominion are generally subject to private dominion, but may be otherwise: for an inheritance before a successor is ascertained has no actual proprietor.

§ 10. *Hae autem res quae humani iuris sunt, aut publicae sunt aut privatae.*

§ 10. Things subject to human dominion are either public or private.

§ 11. Q*uae publicae sunt, nullius in bonis esse creduntur; ipsius enim universitatis esse creduntur. privatae autem sunt, quae singulorum sunt.*

§ 11. Things public belong to no individual, but to a society or corporation; things private are subject to individual dominion.

DE REBUS INCORPORALIBUS.

§ 12. *Quaedam praeterea res corporales sunt, quaedam incorporales.*

§ 12. Again, things are either corporeal or incorporeal.

§ 13. *Corporales hae sunt quae tangi possunt, veluti* fundus, homo, vestis, *aurum, argentum et deni*que alia*e* res i*nnumerabiles.*

§ 13. Things corporeal are tangible, as land, a slave, clothing, gold, silver, and innumerable others.

§ 14. *Incorporales sunt quae t*angi non *possu*nt*: qualia sunt ea quae in iure consistunt, sicut hereditas, ususfructus, obligationes quoquo modo contractae. nec ad rem pertinet, quod in hereditate res corporales continentur; nam et fru*ctus qu*i ex fundo percipiuntur corporales sunt, et* id *quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum ius successionis, et ipsum ius uten*di fruendi, *et ipsum ius*

§ 14. Things incorporeal are intangible; rights, for instance, such as inheritance, usufruct, obligation, however contracted. For though an inheritance relates to things corporeal, and the fruits of land enjoyed by a usufructuary are corporeal, and obligations generally relate to the conveyance of something corporeal: land, slaves, money; yet the right of succession, the right of usufructuary enjoyment, and the right of the contractor, are incor-

obligationis incorporale est. eodem numero sunt et iura praediorum urbanorum et rusticorum, quae etiam servitutes vocantur. [13 *fere lineae desunt.*]

poreal. So are the rights attached to property in houses and land, denominated servitudes or easements.

Having treated of the law of Persons (unequal rights), we proceed to the law of Things (equal rights), and the first right which Gaius intends to discuss is the right called Dominion. Seduced, however, by an ambiguity of the word Res, which signifies either a right or the subject of a right, his opening statements (§§ 12, 13, 14) are deplorably confused.

In order to see our way, let us first examine Res as denoting the Subject of a right. Every right implies, as we have stated, an obligation; and every right or obligation implies at least two persons, one of whom has the right while the other has the obligation. The immediate OBJECT of every right is an act or forbearance of the person who has the obligation. But the act or forbearance generally relates to some body, that is, to some tangible portion of the external world, whether a thing or a person. This body, accordingly, may be called the mediate, indirect, or secondary Object of the right, or, in the nomenclature we have adopted, its SUBJECT The subject of a right, however, is not always a body; it may be corporeal or incorporeal. For instance, dominion over land is a right to forbearance on the part of all the world from molestation of the owner in dealing with the land. A servitude, say a right of way, is a right to forbearance on the part of all the world from molestation of the person entitled when he passes over certain land. A contractual right is a right to a positive act or performance on the part of a determinate person, say, to the conveyance or delivery of a certain piece of land. In these cases, land, the subject or secondary object of the right, is something corporeal. So, too, when a third person is the subject of a right; for instance, a child or a gladiator, 3 § 199, in the possession (detention or custody) of the parent or employer, and whose removal from such possession engenders in the removing party an obligation ex delicto. But in primordial rights, the subject, at least as distinguished from the two parties in whom the right and obligation respectively vest, is something incorporeal. A man has a right to forbearance on the part of all the world from molestation in his life, health, locomotion, honour. These subjects of the right are incorporeal. Other rights, appa-

rently, have no determinate subject, corporeal or incorporeal, to which they are correlated. In a right to the services of a menial or gladiator, for instance, it would be hard to indicate any subject or secondary object to which the obligation of the menial or gladiator relates.

It is clear that no division of Subjects of right will coincide with a classification of Rights: while, if we divide Res in the metaphysical sense of the World, or Being, or Existence (a sense suggested by the differentiae, corporalis, and incorporalis), Dominion, like all other rights, will be a member of the branch res incorporalis. Gaius, however, wishes us to identify Dominion with res corporalis, and to make Obligation and the fractions of Dominion (servitutes), and even some forms of Dominion (e.g. hereditas), members of the contra-distinguished branch, res incorporalis. (Cf. 3 § 83, omnes ejus res incorporales et corporales quaeque ei debita sunt.)

Gaius was probably not entirely responsible for this confusion of thought, which, perhaps, was too deeply inwoven in the formulae of Roman jurisprudence to be easily eliminated by an institutional writer. E.g. the declaration (intentio) of a real action (in rem actio) was of the form: Si paret (1) illum fundum—(2) illam hereditatem—actoris esse. (Cf. 4 § 3. In rem actio est cum aut corporalem rem intendimus nostram esse aut jus aliquod nobis competere.) Now as hereditas is a jus successionis (2 § 14), it is clear that, if the second formula is correct, the first formula ought to be, not, Si paret illum fundum—but, Si paret illius fundi proprietatem—actoris esse. To meet this and similar inaccuracies of the framers of the formularies, Gaius is misled into identifying in res corporalis two things completely disparate, Right and the Subject of a right. There is a similar confusion in English law, chattels, tenements, and hereditaments being sometimes used to denote the subjects, movable or immovable, of certain rights, sometimes the rights over those subjects: and just as Res is divided into Corporalis and Incorporalis, so Hereditaments are divided into Corporeal and Incorporeal; although, if the term denotes a right, both branches are equally incorporeal: if it denotes the subject of a right, both branches are equally corporeal.

In order to distribute the world of rights minus the rights of status, and to indicate the position held by Dominion in the system

and the method substantially followed by Gaius, we may adopt the following division:—

Equal rights are either SANCTIONED, primary, final; or SANCTIONING, secondary, instrumental.

SANCTIONED rights are either—

REAL: rights availing against all the world (JUS IN REM), or

PERSONAL: rights availing against certain determinate persons (JUS IN PERSONAM).

Sanctioned rights against the world are either—

Unrelated to the external material universe, or

Related to the material universe.

Sanctioned rights unrelated to the material universe are PRIMORDIAL, or inborn rights. (These are not examined separately by Gaius, but are implied in obligatio EX DELICTO.)

Sanctioned rights related to the material universe are POSSESSION, DOMINION, SERVITUDE.

Sanctioned rights availing exclusively against certain persons, correlate to obligations EX CONTRACTU: that is, to the duties immediately produced by contract and before its violation.

SANCTIONING rights are capable of the same subdivision as SANCTIONED rights. They are not examined separately by Gaius, but partly under the head of obligatio EX DELICTO (founded on violation of PRIMORDIAL or other REAL right), partly under the head of obligatio EX CONTRACTU (obligation produced indirectly by contract, that is, by its violation), partly under the head of ACTIONES (procedure): personal actions prosecuting obligation EX DELICTO and EX CONTRACTU; and real actions being the remedy for violations of POSSESSION, DOMINION, SERVITUDE.

We shall find hereafter that the position of POSSESSION, in Roman jurisprudence—whether it belongs to the department of JUS IN REM or of OBLIGATIO EX DELICTO is a moot question; but at present we need do no more than notice the existence of the controversy. We need also only to indicate a further division of rights and obligations into SINGLE rights and obligations, such as those of which we have just given a classification, and

AGGREGATES of rights and obligations (UNIVERSITAS JURIS), such as Hereditas. A UNIVERSITAS JURIS includes Obligations as well as Rights, Jus in personam as well as Jus in rem, and Sanctioning rights as well as Sanctioned rights. But in spite of the diverse character of these elements of which it is composed, the JURIS UNIVERSITAS itself, or the ideal whole of these various elements, is regarded, e. g. in Hereditatis petitio, as a Right, not an Obligation; as a Jus in rem, not a Jus in personam; as a Sanctioned right, not a Sanctioning right. (As Res includes Obligation (res incorporalis) as well as Dominion (res corporalis), I have used the term RERUM UNIVERSITAS to denominate the subject of Books II and III, as marking more clearly than JURIS UNIVERSITAS an antithesis to RES SINGULAE; though I am aware that Rerum universitas has generally a more insignificant acceptation, denoting an artificial whole—a flock, herd, or library—in opposition to the ingredients—the single sheep, horses, books—of which it is composed.)

As Gaius thought that he could obtain the idea of Dominion by a division of Res into corporalis and incorporalis, so he seems to have thought that he could distinguish private dominion, the special department which he intends to examine, from other forms of dominion by a further division of Res. The phrases res divinae, res humanae, res communes, res publicae, res privatae, do, indeed, suggest the notion that res privatae is a specific member of the genus Res; but the appearance is fallacious. Very little reflection will convince us that res divinae, res publicae, res privatae are not a division of the SUBJECTS of property (res); for the same thing, a piece of ground, for instance, may be the subject of divine or public or private dominion; but merely a division of proprietors. In res divinae, the only doubtful case, the gods were deemed to be proprietors. Sed et illa interdicta quae de locis sacris et de religiosis proponuntur veluti proprietatis causam continent, Dig. 43, 1, 2, 2. 'The interdicts respecting sacred and religious places protect a quasi-property.'

The division of the subjects of right by their physical differences, the only way in which they can be divided, though only of subordinate importance, and though it cannot furnish the distinctions of Dominion and Obligation, nor of Public and Private dominion, yet has a considerable influence on jurisprudence, and demands a certain amount of attention. Thus ocean, air, and light, as opposed to the

earth, are by their nature essentially res communes. Being incapable of appropriation, they have not been appropriated and are held in communism. Again, the distinction of res corporales and res incorporales may ground the distinction between Dominion and Primordial rights. Again, in wild animals, as opposed to tame, property is only coextensive with detention. On the difference between specific and generic things, or things consumed by use, quae pondere numero mensurave constant, and things not consumed by use, is founded the distinction between the contracts of mutuum and commodatum. On the same difference of specific and generic things are founded in English law different rules for the transmutation of property in the contract of sale, 3 § 139; and the distinction of movables and immovables founds a still more important difference in the English forms of alienation and rules of succession.

The phrases in nostro patrimonio and extra nostrum patrimonium, § 1, are apparently equivalent to alicujus in bonis and nullius in bonis, § 9, and to the expressions we meet elsewhere, in commercio and extra commercium.

Of res communes, or the dominion of mankind, which sometimes comes under discussion but is not mentioned by Gaius, we may observe, that it scarcely falls within the scope of our present province, namely, positive law, for all positive law is confined to the territory of the particular sovereign state by which it is enacted.

All the things within the territory of a given state are subject to its dominion, that is, are res publicae in a general sense of the term. Of these things it allows the dominion over some to vest in private individuals for their own advantage, while it retains the dominion over others in itself as a corporation or collective person (personarum universitas). This gives us a division of all things into res privatae and res publicae in a narrower sense of the term. We must note, however, that the dominion of the state is not exactly similar to private dominion, that is to say, is not dominion in the proper sense or the sense in which the word is used in civil law. For the civil dominion of private persons is a right protected and sanctioned by a political superior, whereas a sovereign state is by hypothesis in subjection to no superior. A state, then, can only be said to have dominion in a modified sense of the word, that is, so far as it is not restrained by any positive law of any

superior from using and dealing with certain things as it may please.

Of things subject to public dominion, some are vested immediately in the state, others in subordinate persons, single or corporate, magistrates, for instance, and municipalities, to be held by such persons for various public purposes. Among these we may reckon res divinae which are portions of public dominion vested in certain corporations in trust for religious purposes.

Another division of res publicae is into res in patrimonio populi and res non in patrimonio populi. Under the former are included the public treasury, the public domain, public slaves, escheats (caduca) or res privatae that relapse to the state by forfeiture, or as ultimus heres; in other words, all things of which the state as universitas retains not only the property but also the use and disposition (quasi propriae et privatae res universitatis, Dig. 43, 8, 2, 4). The other class includes, high roads, public rivers, public buildings, &c., that is, all things of which the property is in the community and the use in the members of the community. Or we may say that the property is in the universitas, but it is subject to a personal servitude (usus) vested in all the private members of that universitas (singuli, universi).

Not only res publicae but res privatae may be subject to this sort of personal servitude. For instance, the banks of public rivers and the trees thereupon are the property of the adjacent proprietors: but the navigators of these rivers have the right of mooring, landing, unlading, and using the banks in various other ways, Inst. 2, 1, 4.

Property absolute or pre-eminently so called, may be defined as a right of unlimited duration, imparting to the owner a power of indefinite enjoyment or use, and a power of aliening from all who in default of alienation by him might succeed by descent; or, in other words, from all successors interposed between himself and the sovereign as ultimus heres. It is accordingly sometimes said to consist of jus utendi, fruendi, abutendi; where abusus includes the power of consumption or destruction, of dereliction, and of disposition (sale, exchange, gift, mortgage, lease, &c.). Another element is equally important, the right of exclusion (jus prohibendi).

Besides absolute property Roman law recognizes various kinds of partial property, real rights over a subject of which the dominion

is in another person, called jura in re or jura in re aliena, rights which fall short of absolute property but approximate to it in various degrees. Such are servitudes, mortgage (pignus), superficies, and emphyteusis. These may all be regarded as detached fractions of property, portions of the right of dominion taken from the proprietor and vested in another person. They are explained by Justinian in the parallel passage of his Institutes, and, though not mentioned by Gaius, demand here a brief notice.

Servitudes are (1) praedial or real (praediorum), that is, belong to a person as owner of a certain house or land (praedium dominans) in respect of a house or land belonging to another proprietor (praedium serviens), or (2) personal (personarum), that is, are vested in a person without relation to his ownership of praedium dominans. (Compare in English law the division of easements into easements appurtenant to land and easements in gross.)

Praedial servitudes are servitudes properly so called and are contrasted with property by their precise and definite circumscription. Property is a right against the world which gives to the party in whom it resides a power of dealing with the subject which is not capable of exact definition. Servitude is such a right against the world as gives to the party in whom it resides a power of using the subject which is susceptible of precise description. It is a definite subtraction from the indefinite powers of use and exclusion which reside in the proprietor; or a right against the owner and the rest of the world to make certain use of a thing or prohibit certain uses.

Praedial servitudes are (1) rustic, relating to land, or (2) urban, relating to houses. Urban servitudes are further subdivided into Positive or Affirmative and Privative or Negative. The following considerations will show the meaning of this division and its origin in the nature of Property.

Servitudes are limitations of, or deductions from, another person's ownership or dominion. Dominion contains, among other elements, (A) certain powers of action (jus utendi), and (B) certain powers of exclusion (jus prohibendi). Restrictions on these powers will be (*a*) a certain necessitas non utendi, and (*b*) a certain necessitas patiendi. Correlative to these obligations on the part of the owner of the servient tenement will be certain rights of the owner of the dominant tenement, viz. (α) a certain jus prohibend, and (β) a certain jus utendi, or in other words, (α) a certain negative servitude, and (β) a certain affirmative servitude. As it happens that all the

servitudes which public policy has recognized in relation to land are of an Affirmative character and relate to some transient action, they may be called jus faciendi: while those relating to houses are both Affirmative and Negative (jus prohibendi). Affirmative Urban servitudes, implying some permanent structure, may, in conformity with classical usage (e. g. jus tignum immissum habendi) for the sake of distinction from the Rural servitudes, be called jus habendi: they resemble them in the generic character that they are each a jus utendi.

(1) Instances of Rural servitude (jus faciendi) are iter, or jus eundi, right of way for beast and man on foot or on horseback over the servient tenement to the dominant tenement; actus or jus agendi, right of way for ordinary carriages (not for heavy-laden waggons); via (or jus vehendi?), right of paved way for heavy-laden waggons; aquae haustus, the right of drawing water from a private spring; aquae ductus, the right of conveying water over the servient tenement; pecoris ad aquam appulsus, the right of watering cattle; jus pecoris pascendi, the right of pasturing cattle; jus calcis coquendae, the right of burning lime; jus cretae eximendae, the right of quarrying for chalk; jus arenae fodiendae, the right of taking sand; jus sylvae caeduae, the right of cutting timber, D. 8, 3.

(2) Instances of jus habendi are jus tigni immittendi, the right of inserting a beam in a neighbour's wall; jus oneris ferendi, the right of resting a weight on a neighbour's wall or column (this servitude involves on the part of the servient owner the positive obligation of repairing the servient wall (refectio); whereas all other servitudes, as real rights, are contradistinguished from obligations proper, or personal rights, by corresponding to the merely negative obligation of abstention); jus protegendi, the right of projecting a roof over the soil of a neighbour; jus stillicidii recipiendi or avertendi or immittendi, the right of directing the rainfall on to a neighbour's roof or area; jus cloacae immittendae, the right of having a sewer through the area of a neighbour; servitus luminum or jus luminis immittendi, the right of having a window in a neighbour's wall; jus officiendi luminibus vicini, the reacquired right of diminishing the light of a neighbour; jus altius tollendi, the reacquired right of increasing the height of a structure. 2 §§ 31.

(3) Instances of jus prohibendi are jus altius non tollendi, the

right of forbidding a neighbour to raise the height of his buildings; jus ne prospectui officiatur, the right of having a prospect unintercepted; jus ne luminibus officiatur, the right of having the access of light to one's windows unobstructed; jus stillicidii non avertendi, the reacquired right of prohibiting my neighbour from discharging his rainfall into my area.

Personal servitudes are rights of a less limited character: instances are Habitatio, the right of occupying a house, Usus, the right of using a thing and consuming its immediate fruits or products, without the right of letting the thing or selling its products, of acquiring, in other words, its rent and profits, which may be regarded as its mediate or secondary fruits. Fructus, usually called Ususfructus, the further right of leasing the thing and selling its fruits. Habitatio, Usus, Ususfructus were usually estates for life, and, unlike real servitudes, implied Detention of the subject; Possession of the subject, as opposed to Detention, remaining in the proprietor. Moreover, any of the powers which usually and regularly compose Real servitudes may be conferred in the form of Personal servitudes, which are then called by modern jurists servitutes personales Irregulares.

For pignus, see 3 § 90, commentary.

Superficies is the right of a person who has bought a house without the ground on which it stands, or who has built a house on another's ground with his permission, a house, that is, which at gentile law, by the rule of Accession, is the property of the proprietor of the soil. The Praetor, however, recognized in the superficiarius a jus in re which he protected by an interdict de superficie and an actio in rem utilis.

For emphyteusis, see 3 § 145. Although an emphyteusis might be of unlimited duration, and was alienable without the consent of the proprietor, yet the proprietor had a reversion on failure of the heirs of the emphyteuta, just as the feudal lord of a fee has the reversion on failure of the heirs of the tenant in fee. Accordingly, emphyteusis is regarded as the model on which feudal tenure was instituted. This reversion or escheat to the lord of the fee makes property in land theoretically imperfect, and, like emphyteusis, rather a jus in re aliena than plenary dominion. Property in chattels, on the contrary, has no reversioner interposed between the proprietor and the sovereign as ultimus heres, and, therefore, is absolute.

The Incorporeal hereditaments of English law generally cor-

respond to the Servitutes and jus in re aliena of Roman law. But the principle: Servitutum non ea natura est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat, D. 8, 1, 15, 1: 'Servitudes are not a right to a performance but to a permission or forbearance:' would exclude from the class of Servitudes some members of the class of Incorporeal hereditaments; e.g. Rents, which are said to lie in render, i.e. to involve a performance of the party burdened, not in prender, i.e. not to consist in an act of the party entitled. Roman law adhered strictly to the principle that Real rights, or rights against the world, can only correlate to negative obligations, duties of forbearance; and that rights correlating to positive obligations, or duties of performance, can only be Personal; i.e. can only regard a particular individual and his universal successors.

Having described the various kinds of real right (jus in rem), i.e. dominion and its fractions (jura in re), we proceed to the TITLES of real rights, that is to say, the events to which these rights are annexed by the legislator; in other words, the modes prescribed by the legislator by which such rights may be acquired; in other words, the legislative definitions of the classes of persons in whom such rights are declared to be vested.

The Titles of real rights are divisible into Titles by which single real rights are acquired and Titles by which aggregates of rights (universitates jurum) are acquired.

Titles by which single real rights are acquired are divisible into Titles sanctioned by the civil law and Titles sanctioned by natural (gentile) law (jus gentium), natural law denoting the rules introduced by praetors and jurists as consonant to the general reason of mankind.

Titles by civil law are in jure cessio, usucapio, mancipatio, traditio, and others which will be mentioned. Titles by natural law are traditio, occupatio, accessio, and others which will be mentioned. We commence with Titles by civil law, and the introductory propositions which are now illegible in the manuscript of Gaius may be supplied from Ulpian, Regulae, 19, 1, or Gaius, 1 § 120.

'Things are either mancipable or not mancipable. Things mancipable are land and houses on Italian soil, slaves, tame animals employed for draught and carriage, as oxen, horses, mules, and asses.'

RERUM CORPORALIUM ADQUISITIONES CIVILES.

§ 15. Item [2 *lin.*] *Ea autem animalia nostri quidem praeceptores* statim ut nata sunt mancipi esse putant: *Nerva vero, Pro*culus et ceteri diversae scholae auctores non aliter ea mancipi esse putant, quam si domita sunt; et si propter nimiam feritatem domari non possunt, tunc videri mancipi esse, *cum ad eam aetatem pervenerint, cuius aetatis domari solent.*

§ 15. These, according to my school, are mancipable as soon as born; according to Nerva and Proculus and their followers, are not mancipable until tamed, or if too wild to be tamed, until they attain the age at which other individuals of the species are tamed.

§ 16. *Ex diverso bestiae nec* mancipi sunt, velut ursi, leones, item ea animalia quae fere bestiarum numero sunt, velut elefantes et cameli: et ideo ad rem non pertinet, quod haec *a*nimal*i*a etiam co*llo* dor*sove domantur* . . . . . . quoru*m* . . . mancipi esse; qua*e*dam non mancipi sunt.

§ 16. Things not mancipable include wild beasts, as bears, lions; and semi-wild beasts, as elephants and camels, though sometimes employed for draught or carriage.

§ 17. It*e*m f*ere* omni*a quae* in*cor*p*o*ralia sunt nec mancipi sunt, excepti*s* servi*tutibus* pra*e*dio*rum rust*ic*orum in Italico solo, quae mancipi sunt*, qua*m*vis sint ex numero *re*r*um* i*nc*orpor*alium.*

§ 17. Also things incorporeal, except rustic servitudes on Italian soil.

§ 18. Magna autem differentia est mancipi r*erum et* nec mancipi.

§ 18. There is an important difference between things mancipable and things not mancipable.

§ 19. Nam res nec *mancipi nuda traditione alienari possunt*, si modo corporales sunt et ob id recipiunt traditionem.

§ 19. Property in things not mancipable is transferred by mere delivery of possession, if they are corporeal and capable of delivery.

§ 20. Itaque si tibi vestem vel aurum vel argentum tradidero, *s*ive ex venditionis causa sive *ex donationis* sive qua*v*is alia ex *causa*, *t*ua fit ea res si*ne ulla iuris solemnitate.*

§ 20. Thus when possession of clothes or gold or silver is delivered to a vendee or donee or a person otherwise entitled, the property passes by the mere act of prehension.

§ 21. *In eadem* causa sunt *provincialia* praedia, quorum *alia stipen*diaria, alia tributaria vocamus. Stipendiaria sunt ea quae in his provinciis sunt, quae propriae populi Romani esse intelleguntur. Tributaria sunt ea quae in his provinciis sunt, quae propriae *Caesaris esse cre*duntur.

§ 21. Similarly transferrible are estates in provincial lands, whether stipendiary or tributary; stipendiary being lands in provinces subject to the dominion of the people of Rome; tributary, lands in the provinces subject to the dominion of the Emperor.

§ 22. Mancipi vero res *ae*que per mancipationem ad alium transferuntur; unde *scilicet* mancipi res sunt dictae. quod autem valet manci*patio, idem valet et in iure cessio.*

§ 22. Property in things mancipable, on the contrary, is conveyed by mancipation, whence their name, or—a universally applicable mode of transfer—by surrender before a magistrate in a fictitious vindication.

§ 23. *Et manci*patio quidem quemadmodum fiat, superiore commentario tradidimus.

§ 23. The process of mancipation was described in the preceding book.

§ 24. In iure cessio autem hoc modo fit. aput ma*gistratum* populi Romani, vel*ut* Praetorem, vel aput Praesidem provinciae is cui res in iure ceditur, rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO. deinde postquam hic vindicave*rit, Praetor interro*gat eum qui *c*edit, an contra vindicet. quo negante aut tacente, tunc ei qui vindicaverit eam rem addicit. idque legis actio vocatur, quae fieri potest etiam in provinciis a*put Prae*sid*es ea*rum.

§ 24. Surrender in a fictitious vindication is in the following form: in the presence of a magistrate of the people of Rome, such as a praetor or the president of a province of the people, the surrenderee grasping the subject says: I CLAIM THIS SLAVE AS MY PROPERTY BY TITLE QUIRITARY. Then the praetor interrogates the surrenderor whether he makes a counterclaim, and upon his disclaimer or silence awards the thing to the demandant. This proceeding is called a statute-process, and can now be performed before the president of an imperial province.

§ 25. *Pl*e*rum*que *tam*e*n et* fere semper mancipationibus utimur. quod enim ipsi per nos praesentibus amicis agere possumus, hoc n*on est* necess*e* cum maiore difficultate aput Praetorem aut aput Praesidem provinciae qua*erere.*

§ 25. Generally, however, and almost always the method of mancipation is preferred; for why should a result that can be accomplished in private with the assistance of our friends be prosecuted with greater trouble in the court of the praetor or president of the province?

§ 26. *At si* neque mancipata, neque in iure cessa sit res man*cipi* [*desunt* 31 *lin.*].

§ 26. If neither mancipation nor judicial surrender is employed in the conveyance of a mancipable thing . . . .

§ 27. *In summa admo*nendi sumus *nexum Italici soli proprium* esse, provincialis soli ne*xum* non *esse: recipit enim nexus* significationem solum non aliter, *quam si* mancipi *est,* provincial*e vero* nec mancipi *est.* —enim vero provincia . . . . . de mancipa—.

§ 27. Finally, we must observe that alienation by bronze and balance is peculiar to Italian soil, and inapplicable to provincial soil. It exclusively applies to things subject to private or quiritary dominion, whereas provincial soil is only subject to public dominion.

Of civil Titles the oldest were probably in jure cessio and usucapio, the one public the other private, the one containing an act of a political authority, the other subordinate and supplementary to this, and though equally effectual where it applied, yet not quite so extensive in its application.

In jure cessio or surrender before a magistrate cannot fail to recall to an English lawyer two similar modes of alienation that recently existed in English jurisprudence, alienation by Fine and alienation by Recovery, both of which, like in jure cessio, were based on a fictitious action; in both of which, that is to say, although the parties did not really stand in the relation of adverse litigants, the alienee was supposed to recover an estate by process of law. By a Fine, an action commenced against the alienor and at once terminated by his acknowledging the right of the alienee, a tenant in tail could aliene the fee simple, so far at least as to bar his own issue. By a Recovery, a tenant in tail could convey an absolute estate in fee. This was an action supposed to be, not like a Fine immediately compromised, but carried on through every regular stage to the conclusion; whereby the alienee recovered judgment against the alienor, who in his turn recovered judgment against an imaginary warrantor whom he vouched to warranty (cf. laudat auctorem, 3 § 139, commentary). Another employment of fictitious action in English law as a solemn form, not of alienation but of contract, a title, consequently, not of jus in rem but of jus in personam, namely, the Judgment Debt (see 3 § 134, commentary), has no parallel in Roman jurisprudence of the classical period: though in earlier times the Nexum, expressing the obligation of the promisor by the term Damnas, i.e. condemnatus, apparently placed him in the position of a judgment debtor (pro judicato), and rendered him liable to the most rigorous form of execution (manus injectio).

In jure cessio to a late period was the principal mode of manumitting slaves, and a part of the process of emancipation, that is, the release of a son from the patria potestas.

To relieve the magistrate and the parties from the troublesome process of in jure cessio, a new mode of conveyance, by bronze and balance (nexum, mancipium, per aes et libram), which did not require the intervention of a public functionary, was introduced at some subsequent period, but confined to the alienation of certain specific subjects of property. The things capable of this mode of

alienation were at first, probably, only the ordinary booty of a predatory tribe, slaves and the larger kinds of cattle; but afterwards included land, rustic servitudes, and the familia or universitas jurum of a testator, 2 § 103. Not only slaves, but liberae personae of an inferior domestic status, filiusfamilias and filiafamilias, were subject to conveyance by mancipation. By this process, a genuine sale for a valuable consideration, a father could sell his son into domestic bondage (mancipium): by this process, reduced to the state of a fiction, a woman became subject to the manus of a husband (coemptio), and a filiusfamilias was adopted (adoptio) or emancipated (emancipatio).

Mancipation, as conveying property without possession, 4 § 131, may be compared to a Deed in English law; and, like the corresponding English solemnity, might be used as a formality either of alienation or of contract, 3 § 173; or, if we take contract in a wider sense as equivalent to bilateral disposition, of contract either translative or obligative. After the introduction of mancipation mancipable things were the most easily alienable: they could be aliened by mancipation as well as by surrender in court and usucapion, whereas not-mancipable things were only alienable by the two latter modes of transfer.

At a later period, however, in order to facilitate the transfer of property in those cases where it was most difficult, a new and still simpler process was introduced, namely, tradition or the delivery of possession. In such not-mancipable things as were corporeal, the transfer of possession or physical dominion, that is, the exclusive power of acting corporeally on a given body, a title in gentile law, was declared by the legislator to be a title in civil law, to operate a transfer of legal or civil dominion, dominion ex jure Quiritium. Thus the tables were now turned: things, which formerly were most difficult, were now most easy to aliene: the term mancipable, which before denoted an enlargement of the powers of alienation, now denoted a restriction; for mancipable things were things alienable either by surrender or by usucapion or by the cumbrous process of mancipation, but not by tradition: not-mancipable things were things alienable (such of them at least as were corporeal) either by surrender or by usucapion or by the simple process of tradition, though not by mancipation.

In respect of land the title in English law corresponding to tradition is Feoffment. The essence of a feoffment is livery of

seisin (delivery of possession), and though subsequently a deed was always added, yet, originally, livery of seisin was a valid transfer of property without an accompanying deed. There is this, however, to be observed, that in English law conveyance by livery was an older title than conveyance by deed, whereas in Roman law mancipation, which we have assimilated to conveyance by deed, was older than tradition; and property in land, the great subject of transfer by feoffment, was in Rome originally conveyed not by tradition but by mancipation, tradition being, however, a further requisite to effect the transfer of possession.

We proceed to notice minor points in the text of Gaius. We have hitherto spoken of tradition as a title whereby property was acquired. Tradition, however, was only an element, usually the final element, of the complex mode of acquisition to which it gives its name. To be capable of passing property, tradition must be accompanied by another element, usually an antecedent element, some contract or other source of obligation, or some evidence of intention to aliene. The same was true of usucapion. Besides possession for a certain term it was requisite that possession should have had an innocent inception or belief of the possessor that he had a right to take possession (bona fides). This second condition of acquisition was indicated by the preposition pro governing a noun or participle; the bona fide possessor was said to possess pro emptore, pro donato, pro legato, pro derelicto, &c. The condition itself was called the causa (§ 20), or justa causa, or titulus, of the tradition or usucapion; and we now may notice the exact relation of the word Title as used in this commentary to the Titulus of the classical jurists. Title, as used by Austin and as used in this commentary, denotes the totality of the complex conditions to which the law annexes any right, in rem or in personam: titulus as used by the classical jurists is only one portion of the modes of acquisition called Tradition and Usucapion.

Instead of denoting the whole of a complex investitive fact, it denotes in their writings only a constituent part of this fact: it merely denotes the fact by which the acquisition begins, as contradistinguished from the fact by which the acquisition is completed.

§ 21. The system of taxation which Rome imposed on her provinces demands a brief notice. Under the Republic different provinces were subject to different systems, but with the Empire

a tendency to uniformity of taxation commenced: the distinction of tributary and stipendiary provinces was merely nominal in the time of Gaius, and it ceased entirely in the time of Pomponius and Ulpian. As early, probably, as from the time of Marcus Aurelius, under whom Gaius flourished, the following system of direct taxation was uniformly established throughout the Roman world.

Direct taxation was of two kinds: it embraced (1) a poll tax or capitation tax, i. e. a tax on persons (capitis tributum), and (2) a tax on land (agri tributum). The tax on persons (capitatio humana) was a fixed sum, probably of small amount, that was only levied on persons who were not liable to the land tax, on tributarii as opposed to possessores. It was chiefly contributed by three classes, (1) tenant farmers of a semi-servile condition (coloni), (2) artisans and labourers, (3) slaves. From this capitation tax were exempted all who had the rank of municipal senators (decuriones, curiales, ordo), even though they were not possessores. From the classes on whom it was levied, capitatio humana was sometimes called capitatio plebeia.

The tax on landholders (possessores) was also called capitation (capitatio terrena). The reason of this will appear when we explain the mode in which it was levied. The whole territory was ideally divided into units of taxation (capita, juga), districts varying in size according to the nature of the soil, each having an estimated capital value of 1000 solidi or aurei, and hence called millena. From these capita or juga the land tax derived its name of capitatio or jugatio. The list of capita was called a Cadastre (capitastrum), and was revised every fifteen years (one of the earliest land valuations, made by order of Augustus, is mentioned by St. Luke, 2, 1). Every year, as soon as the Minister of Finance had settled the budget of expenditure, proclamation (indictio, delegatio) was made of the amount of taxes required, or rather, the total being divided by the number of capita, of the amount to be paid by each caput. Each caput paid the same sum. The financial year commenced on 1st of September; and the tax was payable in three instalments, on the 1st days of the following January, May, and September. Besides the money tax, and proportioned to it, landowners had to pay a certain tax in raw produce (annona).

Italy and the privileged towns that enjoyed Jus Italicum were exempt from both these forms of direct taxation; jus Italicum consisting, as we have stated, of three elements, (1) free municipal constitution, (2) capacity in the soil of quiritary ownership, and (3)

immunity from both kinds of direct taxation, jugatio humana and jugatio terrena. Italy, however, with the exception of the district about Rome, was subject to certain payments in kind (annona), whence its division into Italia annonaria and Italia urbicaria. According to some, Italia urbicaria contributed to the use of the metropolis payments similar to those which Italia annonaria paid to the imperial household. Moreover, to compensate for her immunity from other taxation, Italy paid 5 per cent. on all testamentary successions (vicesima hereditatum) and 5 per cent. on the value of all manumitted slaves, Livy, 7, 16. Under Diocletian Italy lost her immunities and was reduced to the condition of a province. Savigny, Vermischte Schriften, 16.

§ 24. The legati Caesaris or Presidents of imperial provinces had originally no jurisdiction to preside over legis actio, but this was afterwards conferred upon them, Tac. Ann. 12, 60.

RERUM INCORPORALIUM ADQUISITIONES CIVILES.

§ 28. Incorporales *res* traditionem non recipere manifestum est.

§ 28. Incorporeal things are obviously incapable of transfer by delivery of possession.

§ 29. Sed iura praediorum urbanorum in iure *tantum cedi* possunt; rusticorum vero etiam mancipari possunt.

§ 29. Urban servitudes can only be created by surrender in a fictitious vindication; rustic servitudes may either be acquired by this method or by mancipation.

§ 30. Ususfructus in iure cessionem tantum recipit. Nam dominus proprietatis alii usumfructum in iure cedere potest, ut ille usumfructum habeat, et ipse nudam proprietatem *retineat*. Ipse usufructuarius in iure cedendo domino proprietatis usumfructum *efficit*, ut a se discedat et convertatur in proprietatem. alii vero in iure cedendo nihilominus ius suum retinet: creditur enim ea cessione nihil agi.

§ 30. Usufruct can only be created by surrender in a fictitious vindication. A usufruct surrendered by the owner of the property passes to the surrenderee, leaving the naked property in the surrenderor. A usufruct surrendered by the usufructuary to the owner of the property passes to the surrenderee and is reannexed to the property. Surrendered to a stranger it continues in the usufructuary, for the surrender is deemed inoperative.

§ 31. Sed haec scilicet in Italicis praediis ita sunt, quia et ipsa praedia mancipationem et in iure cessionem re*cipiunt*. alioquin in provincialibus praediis sive qu*i*s usumfructum sive ius eundi, agendi, aquamve ducendi, vel altius tollendi

§ 31. These modes of creating usufruct are confined to estates in Italian soil, just as only these estates can be conveyed by mancipation or judicial surrender. On provincial soil, usufructs and servitudes of cattle way, carriage way,

aedes, aut non tollendi, ne luminibus vicini officiatur, ceteraque similia iura constituere velit, pactionibus et stipulationibus id efficere potest; quia ne ipsa quidem praedia mancipationem aut *in* iure cessionem recipiunt.

watercourse, raising structures, not raising structures, not obstructing lights, and the like, must be created by convention and stipulation; for the estates themselves, the subject of these servitudes, are incapable of conveyance by mancipation or judicial surrender.

§ 32. Et cum ususfructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in provinciis per in iure cessionem constitui posse.

§ 32. In slaves and other animals usufruct can be created even on provincial soil by surrender before a magistrate.

§ 33. Quod autem diximus usumfructum in iure cessionem tantum recipere, non est temere dictum, quamvis etiam per mancipationem constitui possit eo quod in mancipanda proprietate detrahi potest: non enim ipse ususfructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit, ut aput alium ususfructus, aput alium proprietas sit.

§ 33. My recent statement that usufruct was only conveyed by judicial surrender was not inaccurate, although it may to this extent be created by mancipation that we may mancipate the property and reserve the usufruct; for the usufruct itself is not mancipated, although the mancipation of the property and reservation of the usufruct separates the holder of the usufruct from the holder of the property.

§ 34. Hereditas quoque in iure cessionem tantum recipit.

§ 34. Inheritances also are only alienable by judicial surrender.

§ 35. Nam si is ad quem ab intestato legitimo iure pertinet hereditas in iure eam alii ante aditionem cedat, id est ante quam heres extiterit, perinde fit heres is cui in iure cesserit, ac si ipse per legem ad hereditatem vocatus esset: post obligationem vero si cesserit, nihilominus ipse heres permanet et ob id creditoribus tenebitur, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt; corpora vero eius hereditatis perinde transeunt ad eum cui cessa est hereditas, ac si ei singula in iure cessa fuissent.

§ 35. If the person entitled in intestacy by agnation surrender the inheritance before acceptance, that is to say, before his heirship is consummated, the surrenderee becomes heir just as if he was entitled by agnation; but if the agnate surrenders after acceptance, in spite of the surrender he continues heir and answerable to the creditors, his rights of action are extinguished and thus the debtors to the estate are discharged of liability without payment, while the property in the corporeal subjects of the inheritance passes to the surrenderee just as if they were separately surrendered.

§ 36. Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agit; postea vero quam adierit si

§ 36. A devisee's surrender before acceptance is inoperative: after acceptance it has the operation just ascribed to the agnate's surrender

cedat, ea accidunt quae proxime diximus de eo ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem *in* iure cedat.

of an intestate succession after acceptance.

§ 37. Idem et de necessariis heredibus diversae scholae auctores existimant, quod nihil videtur interesse utrum *aliquis* adeundo hereditatem fiat heres, an invitus existat: quod quale sit, suo loco apparebit. sed nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem.

§ 37. So has a surrender by a necessary successor according to the other school, because it seems immaterial whether a man is a voluntary or an involuntary successor (a distinction that will be explained hereafter): according to my school a necessary heir's surrender of the inheritance is inoperative. [3 § 85.]

§ 38. Obligationes quoquo modo contractae nihil eorum recipiunt. nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possum; sed opus est, ut iubente me tu ab eo stipuleris: quae res efficit, ut a me liberetur et incipiat tibi teneri: quae dicitur novatio obligationis.

§ 38. Obligations, in whatever way contracted, are incapable of transmission by either method. If I wish to transfer my claim against a third person, none of the modes whereby corporeal things are transferred is effective: but I must order the alienee to bind the debtor by stipulation: whereupon my debtor is discharged of his debt to me and becomes liable to the alienee; which transformation of a debt is called novation.

§ 39. Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.

§ 39. In default of such novation he cannot sue in his own name, but must sue in my name as my cognitor or procurator.

§ 28. So incorporeal hereditaments in English law were said to lie in grant, not in feoffment, i.e. to be only conveyable by deed, or sealed writing; whereas corporeal hereditaments were conveyable by feoffment, i.e. by livery of seisin or delivery of possession.

§ 30. Inalienability was no peculiar characteristic of Usufruct and other personal servitudes. Alienation of rights, or singular succession as opposed to inheritance or universal succession, was the exception not the rule. Dominion over res singulae was alienable but almost all other rights were intransferable. If we except the delatio of hereditas legitima, § 35, hereditas, as we shall see, was inalienable: and what is said of Rural servitudes, § 30, refers to their creation, not to their alienation. In the law of Persons Patria potestas, 1 § 134, and Tutela, 1 § 168, could be transferred but only by judicial surrender (in jure cessio), i.e. a

process which feigned that there was no transfer. Manus and mancipium could be extinguished but not transferred [Ihering, § 32], except that, apparently, mancipium could be retransferred to the natural parent or mancipator, 1 § 132.

The statement of Gaius that the attempt to cede a usufruct to a stranger is inoperative, a statement adopted by Justinian, Inst. 2, 4, 3, appears inconsistent with the doctrine of Pomponius, a contemporary of Gaius: diximus usumfructum a fructuario cedi non posse nisi domino proprietatis, et, si extraneo cedatur, id est ei qui proprietatem non habeat, nihil ad eum transire, sed ad dominum proprietatis reversurum usumfructum, D. 23, 3, 66: i.e. the attempt to cede a usufruct to a stranger produces a consolidation, that is to say, its extinction by merger in the property of the reversioner. Vangerow, § 344, holds that this passage of Pomponius, being inconsistent with the doctrine that finally prevailed, was admitted into the Digest by inadvertence.

The statement that usufruct, like all other personal servitudes, was inalienable, must, however, be taken with this reservation: although the right itself was intransferable, yet the exercise or enjoyment of the right might be transferred by lease, sale, or donation, D. 7, 1, 38: i.e. while the jus utendi fruendi in the eye of the law still vested in the usufructuary, the actual use and fruition might be enjoyed by a lessee, vendee, or donee.

§ 31. It appears that convention (pactio) alone unaccompanied by tradition or quasi tradition was capable of creating a servitude, in opposition to the general rule of Roman law, that convention can only create at the utmost an obligation (jus in personam), and in order to create a jus in rem must be accompanied by delivery of possession. Other exceptional instances in which convention without any further accompaniment creates a jus in rem, that is, transfers either property or jus in re, are hypotheca (see 3 § 91) and societas omnium bonorum (see 3 § 148). Vangerow, however, holds, § 350, that pactio and stipulatio could not create a genuine servitus, enforcible against the serviens and his assigns (singular successors), but only an Obligatio, enforcible against the serviens and his heirs (universal successors): that in the time of Gaius this was all that could be accomplished; but that afterwards, when quasi traditio of res incorporalis was recognized as practicable, genuine Servitudes could be constituted by Quasi-tradition.

The servitus altius tollendi, or the right of increasing the height

of an edifice, is at first sight very enigmatical. My right of increasing the height of my building, and thus obstructing the lights of my neighbour, would seem to be part and parcel of my unlimited rights of dominion: and, if a dispute arose, one would think that the burden of proof would be on my neighbour, who would have to prove a special limitation of my rights as owner of a praedium serviens and a special right residing in himself as owner of a praedium dominans: that is to say, that instead of my having to prove a servitude or jus altius tollendi, my neighbour would have to prove a servitude or jus altius non tollendi. Cum eo qui tollendo obscurat vicini aedes quibus non serviat nulla competit actio, Dig. 8, 2, 9. 'A man who by building obscures his neighbour's lights, unless subject to a servitude, is not actionable.' Altius aedificia tollere, si domus servitutem non debeat, dominus ejus minime prohibetur, Cod. 3, 34, 8. 'A man cannot be prevented from raising the height of his house unless it is subject to a servitude.' The same rule is laid down in English law. 'By force of a grant or prescription a man may become entitled to maintain his windows in freedom from all obstruction. But in the absence of any grant and before the period has elapsed which suffices for the establishment of a prescriptive claim, it is competent to the owner of the adjoining land to construct a wall or house on it so near to the former as to intercept the light which it would otherwise have received; for his right to erect edifices on any part of his own soil is as clear as that of the first builder.' Stephen, 1, 628. The following is the solution of the problem:

The extinction of Rural and Urban servitudes was governed by different rules. The extinction of a Rural servitude was more easily accomplished than that of an Urban servitude: it was effected by simple non-user (non utendo) on the part of the dominant owner for a period, originally, of two years, afterwards of ten. The extinction of an Urban servitude demanded, besides the negative omission of use on the part of the dominant, a positive possession of freedom (usucapio libertatis) on the part of the servient owner. Gaius thus explains the difference: in a servitus ne amplius tollantur aedes, or ne luminibus aedium officiatur, if the windows of the dominant house are closed with masonry there is a non-usus of the servitude on the part of the dominant owner; if in the same time the height of the servient house is raised there is possession of freedom on the part of the servient owner. Or

in a servitus tigni immissi, if the dominant owner removes the beam from his neighbour's wall there is on his part non-usus; if the servient owner builds up the orifice in which the beam was inserted, there is on his part usucapio libertatis, D. 8, 2, 6. Originally Servitudes, like Dominion, could be acquired by Usucapion; and as the extinction of Urban Servitudes was governed by the same conditions, it was regarded by the jurists as an acquisition of an antagonistic servitude. On the extinction of a Rural servitude, the servient property simply recovered its original dimensions: an Urban servitude was a permanent diminution of the servient property, and on its extinction the servient property, instead of dilating to its original size, recovered what it had lost in the shape of the annexation of a contrary servitude. When at an unknown date the Usucapion of servitudes was abolished by a lex Scribonia, an exception was made in favour of these Contrary servitudes, which in fact were not genuine servitudes, but merely the expression of the greater difficulty of extinguishing an Urban servitude. Libertatem servitutum usucapi posse verius est, quia eam usucapionem sustulit lex Scribonia quae servitutem constituebat, non etiam eam quae libertatem praestat sublata servitute, D. 41, 3, 4, 28. 'Extinction of servitude by usucapion is admissible, for the usucapion abolished by lex Scribonia was usucapion whereby a servitude is constituted, not that which liberates by extinction of servitude.' Thus he who laboured under a disability of building (jus altius non tollendi) was regarded on its extinction as having acquired the opposite easement, jus altius tollendi; he who was relieved of the servitus ne luminibus officiatur was regarded as acquiring a jus officiendi luminibus vicini; he who was relieved from the servitus stillicidii avertendi in tectum vel aream vicini was deemed to acquire a jus stillicidii non avertendi, D. 8, 2, 2. It does not appear that the ordinary requisites of Usucapio, titulus and bona fides, p. 192, were required in this usucapio libertatis.

In usucapio libertatis, a right being acquired, the ten years are complete on the commencement of the last day: in non usus, a right being lost, the ten years are not complete till the last day is terminated, 1 § 111. Vangerow, § 353.

The three servitudes, ne prospectui officiatur, ne luminibus officiatur, ne altius tollatur, are similar in effect, but differ in their degree of extension. The servitus ne luminibus officiatur is not so extensive as the servitus ne prospectui officiatur, for that may

amount to an obstruction of prospect which does not cause a diminution of light, D. 8, 2, 15: but is wider than servitus altius non tollendi, because light may be intercepted by other causes than buildings, by plantation, for instance, though building is the principal means of interception, D. 8, 2, 4.

Another servitude relating to light has been the subject of much controversy. Servitus luminum has been already noticed, p. 166, as apparently identical with jus luminis immittendi, i.e. the right of having a window in a neighbour's wall. Luminum servitute constituta id adquisitum videtur ut vicinus lumina nostra excipiat, D. 8, 2, 4. 'The easement of Lights entitles the owner of the dominant house to have a window in the wall of his servient neighbour.' Eos qui jus luminis immittendi non habuerunt aperto pariete communi nullo jure fenestras immisisse respondi, D. 8, 3, 40. 'Without an easement of immission of light a neighbour has no right to make a window in a common wall.' As it is a law of easements that nulli res sua servit, D. 8, 2, 27, a man cannot have an easement over his own property; and, inferentially, nulli res communis servit, cannot have an easement over that of which he is co-proprietor; it follows that in the preceding passage the expression, a common wall, is used inaccurately to denote a wall of which half the breadth belongs to one proprietor and half to another.

It appears from the above explanation that the servitus luminum and the servitus ne luminibus officiatur belong to different categories, for the servitus luminum, like the jus officiendi luminibus, belongs to the category of jus habendi; while the servitus ne luminibus officiatur belongs to the category of jus prohibendi.

§ 34. The statement that an inheritance is not mancipable may seem inconsistent with what we are afterwards told of the testament by bronze and balance, § 102. There is, however, no real inconsistency. The subject mancipated in the will by bronze and balance, though a universitas, was not an inheritance—there was no inheritance to mancipate, for nemo est heres viventis—but the collective rights—familia, patrimonium—of the testator.

§ 38. The mode of transferring obligations may be more properly considered hereafter, when we examine the titles by which Jus in personam originates or terminates. Gaius glanced at the titles to Hereditas and Obligatio because he was treating of Res incorporalis under which they are included; but he should have

abstained from discussing Obligatio because he is now dealing with Jus in rem, and he should have abstained from discussing Hereditas because he is now dealing with Res singulae.

DE USUCAPIONIBUS.

§ 40. Sequitur ut admoneamus aput peregrino*s* quidem unum esse dominium : ita *a*ut dominus quisque est, aut dominus non intellegitur. Quo iure etiam populus Romanus olim utebatur : aut enim ex iure Quiritium unusquisque dominus erat, aut non intellegebatur dominus. set postea divisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere.

§ 41. Nam si tibi rem mancipi neque mancipavero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium vero mea permanebit, donec tu eam possidendo usucapias : *s*emel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium, tua res esse, ac si ea mancipata vel in iure cessa *esset*.

§ 42. *Usucapio autem* mobilium quidem rerum anno completur, fundi vero et aedium biennio ; et ita lege XII tabularum cautum est.

§ 43. Ceterum etiam earum rerum usucapio nobis competit quae non a domino nobis traditae fuerint, sive mancipi sint *e*ae res sive nec mancipi, si modo ea bona fide acceperimus, cum crederemus eum qui tra*di*derit dominum esse.

§ 44. Quod ideo receptum videtur, ne rerum dominia diutius in incerto essent : cum sufficeret domino ad inquirendam rem suam *a*nni aut biennii spatium, quod tem-

§ 40. We must next observe that for aliens there is only one dominion and only one definition of a proprietor, and so it was in ancient times with the people of Rome, for a man had either quiritary dominion or none at all. They afterwards decomposed dominion so that one person might have quiritary dominion over a subject over which another person had bonitary dominion.

§ 41. If a mancipable thing is neither mancipated nor surrendered by default in a fictitious vindication but simply delivered, the bonitary dominion passes to the alienee, but the quiritary dominion remains in the alienor until the alienee acquires it by usucapion ; for as soon as usucapion is completed, plenary dominion, that is, the union of bonitary and quiritary dominion, vests in the alienee just as if he had taken by mancipation or surrender before a magistrate.

§ 42. Usucapion of movables requires a year's possession for its completion, of land and houses, two years' possession, a rule which dates from the law of the Twelve Tables.

§ 43. Quiritary dominion may also be acquired by usucapion even on a non-proprietor's delivery of possession, and in things either mancipable or not mancipable, if they are delivered to an innocent alienee who believes the deliverer to be proprietor.

§ 44. The reason of the law appears to be the inexpediency of allowing dominion to be long unascertained, the original proprietor having ample time to look after his

pus ad usucapionem possessori tributum est.

§ 45. Set aliquando etiamsi maxime quis bona fide alienam rem possideat, num*q*uam tamen ill*i* usucapio procedit, velut si qui rem furtivam aut vi possessam possideat; nam furtivam lex XII tabularum usucapi prohibet, vi possessam lex Iulia et Plautia.

§ 46. Item provincialia praedia usucapionem *non* recipiunt.

§ 47. *Item olim* mulieris quae in agnatorum tutela erat res mancipi usucapi non poterant, praeterquam si ab ipsa tutore *auctore* traditae essent: id*que ita* lege XII tabularum ca*utum erat*.

§ 48. I*t*em liberos homines et res sacras et religiosas usucapi non posse manifestum est.

§ 49. Quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem XII tabularum prohibitam esse, non eo pertinet, ut *ne ipse* fur *quive per* vim *possidet*, usucapere *pos*sit (nam huic ali*a* ratione usucapio non competit, quia scilicet mala fide possidet): sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat.

§ 50. Unde in rebus mobilibus non facile p*rocedit, ut bonae fidei possessori usucapio com*petat, quia qui alienam rem vendidit et tradidit furtum committit: idemque accidit, etiam si ex ali*a* causa tradatur. Set tamen hoc aliquando aliter se habet. nam si heres rem defuncto commodatam aut locatam v*el* aput eu*m* depositam, existimans eam esse hereditariam, vendiderit aut donaverit, furtum non committit. item si is

property in the year or two years which must elapse before usucapion is complete.

§ 45. Some things, however, notwithstanding the good faith of the possessor, cannot be acquired by usucapion, things, for instance, of which the owner lost possession by theft or violence, stolen things being declared incapable of usucapion by the law of the Twelve Tables, and things taken with violence by the lex Julia and Plautia.

§ 46. So, too, provincial land and houses are incapable of usucapion.

§ 47. Formerly, when a woman was under her agnate's guardianship, her mancipable things were not subject to usucapion, unless she herself delivered possession of them with her guardian's authority, and this was an ordinance of the Twelve Tables.

§ 48. Free men, also, and things sacred or religious, are obviously not susceptible of usucapion.

§ 49. The common statement that in things stolen or violently possessed, usucapion is barred by the law of the Twelve Tables, means, not that the thief or violent dispossessor is incapable of usucapion, for he is barred by another cause, his guilty knowledge; but that even an innocent purchaser from him is incapable of acquiring by usucapion.

§ 50. Accordingly, in things movable an innocent possessor can seldom acquire dominion by usucapion, because he that sells and delivers, or otherwise bargains and delivers, possession of a thing belonging to another, is guilty of theft. However, this admits of exception, for an heir who believes a thing lent or let to, or deposited with, his ancestor to be a portion of the inheritance, and sells it or gives it

ad quem ancillae usufructus pertinet, partum et*iam* suum esse credens vendiderit aut donaverit, furtum non committit; *f*urtum enim sine affectu furandi non committitur. aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur.

away, is not guilty of theft: again, the usufructuary of a female slave who believes her offspring to be his property and sells it or gives it away, is not guilty of theft; for theft implies unlawful intention: and similarly other circumstances may prevent the crime of theft from attaching to the delivery of a thing belonging to another, and enable the receiver to acquire by usucapion.

§ 51. Fundi quoque alieni potest aliquis *s*ine v*i* possessionem nancisci, quae vel ex negligentia domini vacet, vel qu*ia* dominus sine successore decesserit vel longo tempore afuerit. nam si ad alium bona fide accipientem transtulerit, po*t*erit usucapere possessor; et quamvis ipse qui vacantem possessionem nactus est, intellegat alienum esse fun*d*um, *tamen* nihil hoc *bonae fidei p*osses*s*ori ad *us*ucapionem nocet, *cum* inprobata sit eorum s*ent*entia qui putaverint furti*vum* fundum fieri po*ss*e.

§ 51. Land belonging to another may be entered without violence, when vacant by neglect of the owner, or by his death without leaving a successor, or his long absence from the country, and an innocent person to whom the possession is transferred may acquire the property by usucapion; for though the original seizer of the vacant possession knew that the land belongs to another, yet his knowledge is no bar to the usucapion of the innocent alienee, as it is no longer held that theft can be committed of land.

§ 52. Ru*rs*us ex contrario accidit, ut qui sciat alienam r*em* se possidere usucapiat: velut si rem hereditariam cuius p*oss*essionem heres nondum nactus est, aliquis poss*e*derit; nam ei concessum *est usucapere*, si modo ea res est quae recipit usucapionem. quae species possessionis et usucapionis pro herede vocatur.

§ 52. On the other hand, knowledge of the existence of a proprietor does not always prevent usucapion, for any one may seize a portion of an inheritance of which the heir has not yet taken possession and acquire it by usucapion, provided it is susceptible of usucapion, and he is said to acquire by title of quasi successor.

§ 53. Et in tantum haec usucapio concessa est, ut et res quae solo continentur anno usucapiantur.

§ 53. With such facility is this usucapion permitted that even land may be thus acquired in a year.

§ 54. Quare autem etiam hoc casu soli rerum annua constituta sit usucapio, illa ratio est, quod o*l*im rerum hereditariarum possessione *vel*ut ipsae hereditates usucapi credebantur, scilicet anno. lex enim XII tabularum soli quidem res biennio usucapi iussit, ceteras vero anno. ergo hereditas in ceteris rebus

§ 54. The reason why even land in these circumstances demands only a year for usucapion is, that in ancient times the possession of portions of the inheritance was held to be a means of acquiring the inheritance itself, and that, of course, in a year: for while the law of the Twelve Tables fixed two years for the usu-

videbatur esse, quia soli non est, quia neque corporalis est: *et* quamvis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quae solo tenentur, annua usucapio remansit.

capion of land, and one year for the usucapion of other things, an inheritance was held to fall under the category of 'other things,' as it is neither land nor corporeal: and though it was afterwards held that the universal succession was not acquirable by usucapion, yet the component hereditaments, including land, continued acquirable by a year's possession.

§ 55. Quare autem omnino tam inproba possessio et usucapio concessa sit, illa ratio est, quod voluerunt veteres maturius hereditates adiri, ut essent qui sacra facerent, quorum illis temporibus summa observatio fuit, et ut creditores haberent a quo suum consequerentur.

§ 55. The motive for permitting at all so unscrupulous an acquisition was the wish of the ancient legislator to accelerate the acceptance of successions, and thus provide persons to perform the sacred rites, to which in those days the highest importance was attached, and to ascertain the persons whom creditors might sue for payment of their claims.

§ 56. Haec autem species possessionis et usucapionis etiam lucrativa vocatur: nam sciens quisque rem alienam lucrifacit.

§ 56. This mode of acquisition is sometimes called gratuitous usucapion, for the possessor has notice of another's ownership.

§ 57. Sed hoc tempore etiam non est lucrativa. nam ex auctoritate Hadriani senatusconsultum factum est, ut tales usucapiones revocarentur; et ideo potest heres ab eo qui rem usucepit, hereditatem petendo perinde eam rem consequi, atque si usucapta non esset.

§ 57. In the present day, however, it is ineffectual, for the Senate on the motion of Hadrian decreed that such usucapions are revocable, and the heir by suing for the inheritance may recover possession just as if the property had never been transmuted.

§ 58. Et necessario tamen herede extante ipso iure pro herede usucapi potest.

§ 58. Even a necessary heir, however, by the civil law may lose portions of his inheritance by this usucapion.

§ 59. A*d*huc etiam ex aliis causis sciens quisque rem alienam usucapit. nam qui rem alicui fiduciae causa mancipio dederit vel in iure cesserit, si eandem ipse possederit, potest usucapere, anno scilicet, et*iam* soli si sit. quae species usucapionis dicitur usureceptio, quia id quod aliquando habuimus recipimus per usucapionem.

§ 59. There are other conditions under which a knowledge of another's ownership is no bar to usucapion. After a fiduciary mancipation or surrender of his property, if the owner subsequently has possession of it, he recovers his dominion even over land in the period of a year, by what is called a possessive recovery, because a foregoing dominion is thereby reacquired.

§ 60. Sed cum fiducia contrahitur

§ 60. The fiduciary alienee is

aut cum creditore pignoris iure, aut cum amico, quod tutius nostrae res aput eum essent, si quidem cum amico contracta sit fiducia, sane omni modo conpetit usus receptio; si vero cum creditore, soluta quidem pecunia omni modo conpetit, nondum vero soluta ita demum competit, si neque conduxerit eam rem a creditore debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucratiua ususcapio conpetit.

either a creditor in the position of mortgagee or a friend and protector of the alienor's property in the character of depositary: in the latter case the owner is always capable of possessive recovery: if the alienee is a creditor, the owner can always re-acquire after payment of the debt; but before payment of the debt he can only re-acquire provided he has not hired the thing of his creditor nor possessed it in consequence of request and licence, and thus he re-acquires without giving a consideration.

§ 61. Item si rem obligatam sibi populus vendiderit, *eamque* dominus poss*e*derit, concessa est usus receptio: sed hoc casu praedium biennio usurecipitur. et hoc est quod volgo dicitur ex praediat*u*ra possessionem usurecipi. nam qui mercatur a populo praediator appellatur.

§ 61. Again, the owner of a thing mortgaged to the state and sold for non-payment of the mortgage debt may re-acquire it by possession, but in this case, if it is land, usucapion is biennial: and this is the meaning of the saying, that after praediatura (a public sale) land is recoverable by (biennial) possession, a purchaser from the state being called praediator.

§ 42. The usucapion of movables may be compared with the English law of Estrays. After proclamation in the church and two market towns next adjoining the place where they are found, the property in Estrays, i. e. tame animals whose owner is not known, vests in the crown or the lord of the manor, i. e. the grantee of the crown, on the expiration of a year and a day from the finding. If the owner claim them within a year and a day, he must pay the charges of finding, keeping, and proclaiming them.

Roman law originally only recognized one kind of dominion, called emphatically, quiritary dominion. Gradually, however, certain real rights arose which though they failed to satisfy all the elements of the definition of quiritary dominion, were practically its equivalent, and received from the courts a similar protection. These real rights might fall short of quiritary dominion in three respects, (1) either in respect of the persons in whom they resided, (2) or of the subjects to which they related, (3) or of the title by which they were acquired.

(1.) To be capable of quiritary dominion a man must have one

of the elements of a Roman citizenship. Jus quiritium, right quiritary, sometimes, indeed, denotes all the elements of civitas Romana, Roman citizenship: see 3 § 72. Beneficio principali Latinus civitatem Romanam accipit si ab imperatore jus quiritium impetraverit, Ulpian 3, 2. But the only element of citizenship required for quiritary dominion was commercium, and as we have seen that the Latinus possessed commercium without connubium, the Latinus was capable of quiritary dominion. The alien (peregrinus) on the contrary was incapable: yet he had an equivalent real right, called by Gaius dominion, § 40, which he acquired by titles of natural law (jus gentium), e.g. tradition, occupation, accession, praescriptio, &c., and could maintain by a real action in the court of the praetor peregrinus or praeses provinciae.

(2.) Provincial land was not capable of quiritary dominion. Originally, indeed, private dominion appears to have been confined to movables; and immovables, at least lands, were only subject to the other kind of dominion, public dominion or communism. Private dominion, however, first invaded a portion of the land, to which it was confined within the historic period, and finally superseded public dominion over all the ancient Roman territory; and ager publicus, as opposed to ager privatus, ceased to exist on Italian soil. But in the provinces subsequently conquered, land continued to the end subject exclusively to public dominion; and thus the essential feature of feudal tenure, the exclusive vesting of absolute or ultimate dominion over land in the sovereign, a principle commonly supposed to have been first introduced into Europe by the invading German hordes, had already existed in full force over by far the greater portion of the Roman world. It is true that the provinces were divided into so-called ager publicus and ager privatus; but ager privatus, as well as ager publicus, was subject to a vectigal, and the tenant of the one and lessee of the other were equally devoid of absolute ownership. An estate in ager privatus was acquirable by titles of natural law (jus gentium) and recoverable by real action (vindicatio), and was sometimes called dominion; but was theoretically only possessio or ususfructus, § 7.

(3.) Bonitary dominion was distinct both from alien dominion and from dominion over provincial land: it may be defined as the property of a Roman citizen in a subject capable of quiritary property, acquired by a title not known to the civil law, but introduced by the praetor, and protected by his imperium or supreme

executive power. Thus: we have seen that only non-mancipable things were capable at civil law of transfer by tradition; suppose, now, that a mancipable thing were conveyed to a vendee by tradition; the process would not make him proprietor; he would be merely a bona fide possessor, until by the lapse of a year or of two years he acquired quiritary property by usucapion. The praetor, however, assisted the less cumbrous mode of alienation by treating the vendee as proprietor; by giving him, if in possession, the exceptio rei venditae et traditae against the vendor who sought to recover as quiritary proprietor, and enabling the vendee, if dispossessed, to recover against the world by a vindication based on a fiction of usucapion (actio in rem publiciana, 4 § 36). Bonitary proprietorship, or proprietorship acquired by titles unknown to the civil law, when once invented, was employed by the praetor in other legislative innovations, particularly, as we shall see hereafter, in creating universal successions (bonorum possessio) in bankruptcy, and universal successors unknown to the civil law in testamentary and intestate devolution. These bonitary proprietors could assert their rights by an action, real or personal, based on a fiction of inheritance (formula Serviana, 4 § 35), or an action, real or personal, not based on fiction, but in which they appeared as procurators of the original proprietor (formula Rutiliana, 4 § 35).

The barbarous term Bonitary (formed from the classical, in bonis esse, in bonis habere), has the authority of Theophilus, who speaks of δεσπότης βονιτάριος, 1, 5, 4; he also calls bonitary dominion natural dominion (φυσικὴ δεσποτεία), as opposed to statutory, civil, or quiritary dominion (ἔννομος δεσποτεία).

The only substantial inferiority in later times of the bonitary to the quiritary proprietor was that the former was incapable of giving by manumission more than latina libertas, 1 § 213, so that after Latinitas was abolished Justinian could truly say that the difference between the two kinds of ownership was merely nominal, Cod. 7, 25.

§ 43. Quiritary dominion, as separated from bonitary dominion, was called nudum jus quiritium. After Justinian had abolished the nudum jus quiritium, Cod. 7, 25, and the distinction of things mancipable and things not mancipable, Cod. 7, 31, and, consequently, the distinction between bonitary and quiritary dominion, we might have expected that the actio Publiciana, which, as we have just seen, originated in the distinction between things man-

cipable and things not mancipable, would have become obsolete. We find it, however, still treated as an important remedy in Justinian's legislation. The reason is, that this remedy was not only applicable to the alienation by tradition of a mancipable thing, the application we have hitherto considered, but to the alienation of anything whatever by a non-proprietor to an innocent alienee. Usucapion, as in the former case, would in the lapse of time have given the alienee plenary dominion, and, with it, vindication in the event of a loss of possession; but if he lost possession whilst usucapion was still incomplete, he would have had no remedy (for, not being owner, he could not vindicate), if the praetor had not allowed him to sue by the actio Publiciana, which treated bona fide possession, that is, usucapion possession, or the inception of usucapion, as if it were plenary dominion. In the Digest this circumstance is mentioned as the sole ground on which Publiciana was maintainable, as indeed it was, after the abolition of mancipation. Si quis id quod traditur (we should probably read, Si quis quid traditum) ex justa causa non a domino, et nondum usucaptum petet, judicium dabo, Dig. 6, 2, pr. 'On delivery for a just consideration by a non-proprietor, and before usucapion, the alienee shall have an action to recover possession.' In the intentio of this action the plaintiff set out the contract or other justa causa which preceded tradition, 4 § 36, whereas, in an ordinary vindication, he merely asserted his ownership in general terms. See, however, 4 § 16, com. as to expressio causae, and 4 § 109, com. as to causa adjecta.

§ 45. Lex Plautia was passed by the tribune Marcus Plautius after the Social war, B.C. 89. Lex Julia de vi publica seu privata is supposed to have been enacted about the middle of the reign of Augustus.

§§ 52—58. A successor (heres) was either voluntarius, empowered to accept or reject the succession, or necessarius, designated without any such power of election. Heres voluntarius was either an agnate entitled to succeed an intestate, or any devisee, not being a child of the testator, entitled under a will. Heres necessarius was either a manumitted slave, or a self-successor (suus heres), that is, a child under power of the testator or intestate, § 152. In every case but that of the suus heres, so long as the heir had not taken possession, any stranger was permitted to seize parts of the inheritance and acquire property therein by usucapion. The only title (causa, titulus) required for this acquisition was the overture or

delation of the inheritance and vacancy of possession. This possession, which Gaius (§ 52) calls pro herede (see Dig. 5, 3, 9), is more properly called pro possessore. Pro possessore vero possidet praedo, qui interrogatus cur possideat, responsurus sit, quia possideo, nec contendit se heredem vel per mendacium, nec ullam causam possessionis possit dicere, ibid. 'Possessor, as possessor, is the occupant, who, asked why he possesses, answers, "Because I possess," and does not claim to be heir even mendaciously, and has no title of possession to allege.' The constitution of Hadrian (Sc. Juventianum D. 5, 3, 20, 6) did not prevent the usucapion, but made it nugatory by allowing the heir to recover the hereditaments by real action (hereditatis petitio, or the interdict Quorum bonorum), just as if the usucapion had never been completed. The word 'however,' § 58, appears to be an admission of Gaius, that the reason he has suggested for this excentric rule, the wish to ascertain speedily the person bound to perform the sacred rites and to satisfy the creditors, is inadequate, as the seizure and usucapion was permitted even when an enfranchised slave was heir, when, that is to say, the alleged motive could not operate, as a manumitted slave is a necessary and immediate successor. Indeed, in 3 § 201, Gaius speaks as if it were exclusively against the enfranchised slave, and not against the voluntarius heres, that this mode of acquisition was permitted by the law; but his language admits of explanation. Gaius is there illustrating the proposition that a man may acquire by usucapion a thing which he is aware already has a proprietor. Now in the interval before a heres voluntarius has accepted the succession, the interval during which strangers would be most likely to seize portions of the inheritance, these portions would be res nullius, § 9, would have no proprietor, and therefore could not illustrate the proposition that res aliena, i.e. res alicujus, was capable of usucapion in spite of the acquirer's knowledge of existing ownership. Gaius, therefore, takes no notice of usucapion against heres voluntarius, and only quotes the usucapion against the enfranchised slave.

The only successor who was not liable to be thus plundered was the suus heres. Nihil pro herede posse usucapi, suis heredibus existentibus, magis obtinuit, Cod. 7, 29, 2. 'That no stranger can acquire as quasi-heir by usucapion against a self-successor, is an established rule of law.'

Though the occupant of the vacant hereditament was called praedo, his possession, being encouraged by the lawgiver, was not

unlawful until restitution was claimed, Savigny, § 264. This possession is probably the key to an enigmatical rule in Roman law: ipsum sibi causam possessionis mutare non posse, Dig. 41, 3, 33, 1; causam possessionis neminem sibi mutare posse, Dig. 41, 5, 2, 1. 'No man can change at pleasure his title of possession.' With the intention, apparently, of limiting the operation of possessio pro possessore, an anomalous institution of questionable expediency, the rule declares that a person who commences his possession or detention of a thing in the character of a vendee from a non-proprietor, or as lessee, borrower, depositary, or even thief, shall not be able, on the death of the true proprietor, to accelerate or initiate usucapion by merely professing that he ceases to hold in his former character and proceeds to hold as possessor pro possessore.

Possessio pro possessore was perhaps the germ of the intestate succession of next of kin or cognati, a succession, as we shall see, not originally recognized in Roman law; at least, the family or next of kin of an intestate would generally have the best chance of seizing any movables or immovables that he left; and perhaps it was this equitable result, no less than the object mentioned by Gaius, that, in the absence of a regular succession of cognati, led the public to look on possessio pro possessore as a rational and salutary institution. A curious parallel, in respect of the religious motive of the legislator, is to be found in the rule of English law respecting Ouster, or dispossession, of the incorporeal hereditament called an Advowson. When a stranger that hath no right presenteth a clerk, who is thereupon admitted and instituted, unless within six months after the avoidance the patron pursues his right by the possessory action of Quare impedit, he loses that presentation as a punishment for his own negligence, and for the peace of the church: though he may present on the next vacancy as if no such usurpation had happened. Originally he lost the inheritance of the Advowson, though he might recover it for future presentations by droitural writ of right of advowson. The reason given for his losing the present turn and not ejecting the usurper's clerk, was, that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, the law preferred the peace of the church, provided a clerk were once admitted and instituted, to the right of any patron whatever.

The institution of usucapio pro herede and pro possessore, or rather the Sc. Juventianum by which it was defeated, has left its traces in

the formula, still to be found in the Digest, of the interdict Quorum bonorum, 4 § 144, the remedy whereby a person who claimed not as civil heir (heres), but as praetorian successor (bonorum possessor), established his right to succeed and recovered possession of the hereditaments. To leave these traces in the wording of the interdict was according to Vangerow no oversight on the part of Justinian, as although in his legislation the last remnants of the institution of usucapio pro possessore, that is by a mala fide possessor, had been definitively abolished; yet usucapio pro herede, that is, by a bona fide possessor, or one who sincerely though mistakenly held himself to be heir, was still recognized by jurisprudence, § 320.

§ 61. The circumstances contemplated seem to be as follows: A proprietor is debtor to the state, and his lands are mortgaged as security for the debt. On default of payment, the state exercises the power of sale: if the debtor is not turned out of possession by the purchaser (praediator) in two years he recovers his proprietorship by usureception.

Provincial lands were not subject to Usucapion: they might however be acquired by an analogous title, longi temporis praescriptio, i. e. possession for ten years during the presence of the former proprietor (inter praesentes), and for twenty years during his absence (inter absentes).

Usucapion required something beyond mere possession for a certain period; and something beyond what we hereafter call Interdict possession, 4 § 148. The conditions of possession which entitled a possessor to appeal for the protection of his possession to the praetor's interdict were merely that it should be adverse (with the knowledge of the other party and without his permission), and, in respect of the other party, commenced without violence (nec vi nec clam nec precario). To produce Usucapion (1) the thing to be acquired must be capable of usucapion, i. e. not taken by theft or violence from the former proprietor; (2) the possession of the usucapient must be based on a justa causa or titulus, such as contract or bequest; (3) and commenced with bona fides on his part. Bona fides, in the case of original acquisition, e. g. usucapio pro derelicto, is a belief that the thing is res nullius, has no proprietor. In the case of derivative acquisition it is the belief that the auctor, or person from whom the thing is derived, is either proprietor or, if not proprietor, has a power of disposition as agent, guardian,

mortgagee, or otherwise. Vangerow, § 321. The Canon law requires during the whole period of prescription the bona fides which the Civil law only requires at the inception.

Justinian remodelled the law of Usucapion. For movables he extended the period from one year to three years: for immovables he abolished the distinction between Italian and provincial land, and in every case required ten years' possession if the parties were domiciled in the same province, and twenty years' possession if they were not domiciled in the same province. Further, he introduced a new usucapion (longissimi temporis praescriptio), which was governed by less stringent conditions than the ordinary usucapion (longi temporis praescriptio). It applied both to movables and immovables, was not vitiated by certain flaws in the subject (furtiva, violenta), and needed no support of any titulus, but only required bona fides in its inception on the part of the possessor, Cod. 7, 39, 8. It was completed in thirty years.

Usucapion, particularly in this its later form, requires to be carefully distinguished from the Limitation of actions (temporalis praescriptio) with which it has been coordinated by some civilians under the name of Acquisitive, as opposed to Extinctive, Prescription. We shall see, 4 § 110, that all actions were originally divided into temporales and perpetuae, temporales being such as could only be brought within a certain period (e. g. in the case of penal actions, a year) from the time when the right of action accrued, perpetuae such as were subject to no such limitation. Subsequently, however, even the latter were limited, and no action could be brought after thirty years from the nativity of the action or the time when the right of action accrued (actio nata). In the case of personal actions there is no danger of confusing Usucapion and Limitation. Usucapion implies possession, and in the case of personal actions, or jus in personam, no such thing as possession is conceivable, for possession only relates to the subjects of jus in rem. Usucapion and the Limitation of real actions are more similar, but even here a distinction may be recognized. Limitation is the extinction of a right by neglect of the person entitled, by his omission to enforce his remedy: Usucapion is the acquisition of a right by something positive on the part of the acquirer, his strictly defined possession during a certain number of years. Even extraordinary Usucapion requires, as we have seen, bona fides in the

commencement of possession: no such condition is attached to Limitation or temporalis praescriptio.

English law originally only recognized Usucapion in the case of incorporeal hereditaments or servitudes, e.g. rights of way; for the acquisition of which the Prescription Act, 2 and 3 Will. 4, c. 71, requires possession during twenty years. Here we seem, at first sight, to have a remarkable divergence between English and Roman jurisprudence: for we have seen that the lex Scribonia, D. 41, 3, 4, 29, abolished the usucapion of Servitudes, the one kind of hereditament in which acquisitive prescription was recognized by English law. The divergence, however, is not so great as it appears; for the lex Scribonia was partially defeated by the jurists, who recognized the establishment of Servitudes by longa quasi possessio, diuturnus usus, longi temporis consuetudo, D. 8, 5, 10. This differed from usucapion by not requiring either titulus or bona fides, but merely the absence of violence, secrecy, and permission (nec vi, nec clam, nec precario). It was completed in ten years if the parties were domiciled in the same province; otherwise, in twenty years. The right established by this acquisitive prescription was enforced by actio utilis. Moreover, since the Act for the limitation of real actions, 3 and 4 Will. 4, c. 27, deprives a proprietor of land of his right as well as his remedy if he omit to bring his action to recover it within twenty years after the right accrued, Usucapion (Acquisitive prescription) in corporeal as well as incorporeal hereditaments may be said to be recognized in English law.

Whether Prescription, as distinct from Usucapion, extinguishes natural as well as civil right and obligation, is a matter of controversy. In the sphere of Real action Prescription only extinguished the action not the right, C. 7, 39, 8, 1; so that if a proprietor is barred by prescription from asserting his dominion against a mala fide possessor, his right of action nevertheless revives against any third person who obtains possession. In Personal actions, according to Savigny, an obligatio naturalis remains after Prescription: but according to Vangerow, it is certain that no naturalis obligatio remains after the prescription of actio temporalis, i.e. an action with a short period of prescription; and we may conclude that none remains after prescription of actio perpetua. This question, however, belongs to the code of procedure, 4 § 110.

Besides the civil titles which we have examined, two others are mentioned by Ulpian: Singularum rerum dominia nobis adquiruntur

mancipatione, traditione, in jure cessione, usucapione, adjudicatione, lege, 19, 2.

Adjudication (for the nature of which see 4 § 42), whereby property might be taken from one individual and vested in another without any of the ordinary methods of conveyance, may be compared in its operation to the vesting orders made by the Court of Chancery under the Trustee acts. When trustees are disabled by lunacy or infancy from dealing with the estates vested in them, the Court of Chancery is empowered to make orders the effect of which is that the estate becomes immediately vested in the substituted trustees as effectually as if a conveyance had been duly made by the person previously entitled to the legal estate. Another parallel is to be found in the awards of certain commissioners acting under powers given by act of parliament. Thus the order of the Inclosure commissioners for exchange and partition of land closely resembles in subject and effect the adjudicatio of a judex in the actio finium regundorum.

Lex is an ambiguous and miscellaneous title. It includes title by escheat or forfeiture (caducum) under the lex Papia Poppaea, and bequest or legacy (legatum), a title deriving its validity from the lex of the Twelve Tables, Ulpian, 19, 17. Extending our view from res singulae, to which Ulpian confines himself, to universitates, lex was an apt denomination of title by will at the period when wills required the ratification of the Comitia Calata, 2 § 101, as at that time testamentary dispositions were really acts of the legislature. Title by lex in this case may be compared to conveyances by private act of parliament in English jurisprudence.

It may assist to clear our conception of title if we observe that the title 'Lege' is ambiguous, and that (1) while one of its meanings implies an absence of all title, (2) another denotes a miscellaneous group of heterogeneous titles.

(1) The only case in which Law can be said in any distinctive sense to be a cause of acquisition is privilegium or private law. The acquisition of a right by immediate grant from the sovereign (private act of the legislature, private act of parliament) is unlike the acquisition of a person entitled under some general disposition of a universal law. Acquisition by bequest or escheat is not an acquisition by law in any pre-eminent manner, but only in the same degree as is acquisition by mancipation or usucapion or any other title, for all these acquisitions are equally founded on law or the

general disposition of the legislator. But in acquisition by privilegium there is properly speaking neither title nor law. Law is properly speaking a universal proposition, annexing a right or duty to a title: it knows nothing of individual persons, but stops short at classes of persons, classes, that is, defined by the title. Again, title is properly speaking a contingent fact distinct from a corresponding law: a fact which may occur an indefinite number of times, and entitle, that is, invest with rights or duties, an indefinite number of persons, in accordance with the dispositions of one and the same unchanging law. Title, loosely and inaccurately defined as a fact investing a person with a right, would include a privilege, i.e. a law conferring a right immediately on a given individual without the intervention of a fact distinguishable from the law: but title, properly defined as an intervening fact through which a law confers a right mediately, excludes privilege.

Whenever there is a genuine title and genuine law, the title is interposed between the right or duty and the person therewith invested, just as the middle term is interposed between the major and minor terms of a syllogism. E.g. All persons marked, stamped, characterized by a certain fact (B), are invested with a certain right or duty (A); a given individual person (C) bears the badge, mark, or stamp of this fact (B); therefore this individual (C) is invested with these rights or duties (A). A genuine law is only the major premiss, the universal proposition, all B is A. The conclusion, C is A, stating the rights or obligations of the individual, is a mediate or dependent proposition, depending partly on the law and partly on an independent fact, the minor premiss C is B, which often requires to be ascertained by judicial investigation. The condition, represented by the middle term, which connects or disconnects the right or duty, represented by the major term, with a person, represented by the minor term, is the title. In a privilegium we have no such premisses and no such middle term. The conjunction of C with A, the investment of an individual with rights (or the disjunction of C from A, the spoliation of his rights), is here an ungrounded proposition, unwarranted by any recognized title; in other words, unsupported by any subsumption of fact under law.

(2) In Bequest and Escheat and the succession of necessarius heres there is a genuine law and a genuine title, but the law is not the title, any more than it is in any other mode of acquisition. Either because these modes include fewer voluntary acts than some

closely allied modes (for instance, the necessarius heres acquires without aditio, which is a parcel of the title of voluntarius heres), or for some other reason, divers modes are lumped together under the head of acquisition by lex. The name, however, besides being a misnomer, is merely a sink or receptacle of miscellaneous unrelated titles, just as we shall find in the doctrine of obligations that miscellaneous titles (variae causarum figurae) are lumped together under the denomination of quasi-contract.

QUIBUS ALIENARE LICEAT VEL NON.

§ 62. Accidit aliquando, ut qui dominus sit alienan*d*ae rei potestatem non habeat, et qui dominus non sit *ali*enare possit.

§ 63. Nam dotale praedium maritus invita muli*ere* per legem Iuliam prohibetur alienare, quamvis ipsius *sit* vel mancipatum ei dotis causa vel in iure cessum vel usucaptum. quod quidem ius utrum ad Italica tantum praedia, an etiam ad provincialia pertineat, *d*ub*it*atur.

§ 64. Ex diverso agnatus furiosi curator rem furiosi alienare potest ex lege XII tabularum; item procurator, *id est cui libera administratio permissa est;* item creditor pignus ex pactione, quamvis eius ea res non sit. sed hoc forsitan id*eo* videatur fieri, quod voluntate debitoris intellegitur pignus alienari, qui olim pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur.

§ 62. It sometimes occurs that a proprietor has not a power of alienation, and that a non-proprietor has a power of alienation.

§ 63. The alienation of dower land by the husband, without the consent of the wife, is prohibited by the lex Julia, although the husband is proprietor of the land by its mancipation as dower, or by surrender before a magistrate, or by usucapion. Whether this disability is confined to Italian soil, or extends to the provinces, authorities differ.

§ 64. Contrariwise, an agnate, as a lunatic's committee, is empowered to aliene his property by the law of the Twelve Tables; and so is an agent, when invested by his principal with free power of administration (Inst. 2, 1, 43). Again, a pledgee, in pursuance of his convention, may aliene the pledge, though not proprietor; this, however, may be said to rest on the assent of the pledgor previously given in the contract of pledge, which empowered the pledgee to sell in default of payment.

§§ 62–64. It is conjectured that by some accidental displacement these three paragraphs have been transposed, and that in their proper order they should follow § 79 and precede § 80. There seems no good reason why they should be interposed between the titles of civil law and the titles of natural law.

§ 63. The lex Julia, relating only to Italian soil, permitted the

husband to aliene the dotal land, with the consent of the wife, but prohibited its hypothecation, even with her consent. Justinian extended the prohibition to provincial soil, and to alienation with the wife's consent, Inst. 2, 8, pr.

ADQUISITIONES DOMINII NATURALES.

§ 65. Ergo ex his quae diximus adparet quaedam naturali iure alienari, qualia sunt ea quae traditione alienantur; quaedam ciuili, nam mancipationis et in iure cessionis et usucapionis ius proprium est civium Romanorum.

§ 65. Thus it appears that some modes of alienation are titles of natural law, as delivery of possession, and others of civil law, as mancipation, surrender, usucapion, for these are titles confined to citizens of Rome.

§ 66. Nec tamen ea tantum quae traditione nostra fiunt naturali nobis ratione adquiruntur, sed etiam *quae* occupando ide*o adquisie*rimus, qui*a* antea nullius essent: qualia sunt omnia quae terra, mari, coelo capiuntur.

§ 66. Another title of natural law, besides Tradition, is Occupation, whereby things not already subjects of property become the property of the first occupant, as the wild inhabitants of earth, air, and water, as soon as they are captured.

§ 67. Itaque si *f*era*m* bestiam aut volucrem aut piscem *ceperimus, quidquid ita* captum *fuerit, id statim nostrum fit, et eo us*que nostrum esse intellegitur, donec nostra custodia coerceatur. cum vero custodiam nostram evaserit et in naturalem libertatem se receperit, rursus occupantis fit, quia nostr*um* esse desinit. naturalem autem libertatem recipere videtur, cum aut oculos nostros evaserit, aut licet *in* conspectu sit nostro, difficilis tamen *eius* rei persecutio sit.

§ 67. For wild beasts, birds, and fishes, as soon as they are captured, become, by natural law, the property of the captor, but only continue such so long as they continue in his power; after breaking from his custody and recovering their natural liberty, they may become the property of the next occupant; for the ownership of the first captor is terminated. Their natural liberty is deemed to be recovered when they have escaped from his sight, or, though they continue in his sight, when they are difficult to recapture.

§ 68. In iis autem animalibus quae ex consuetudine abire et redire solent, veluti columbis et apibus, item cervis qui in silvas ire et redire solent, talem habemus regulam traditam, ut si revertendi animum habere desierint, etiam nostra esse desinant et fiant occupantium. revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.

§ 68. In those wild animals, however, which are habituated to go away and return, as pigeons, and bees, and deer, which habitually visit the forests and return, the rule has been handed down, that only the cessation of the instinct of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the instinct of returning is held to

be lost when the habit of returning is discontinued.

§ 69. Ea quoque quae ex hostibus capiuntur naturali ratione nostra fiunt.

§ 69. Capture from an enemy is another title of property by natural law.

§ 70. Sed et id quod per alluvionem nobis adicitur eodem iure nostrum fit. per alluvionem autem *id* videtur adici quod ita paulatim flumen agro nostro *a*dicit, ut aestimare non possimus quantum quoquo momento temporis adiciatur. hoc est quod volgo dicitur, per adluvionem id adici videri quod ita paulatim adicitur, ut oculos nostros fallat.

§ 70. Alluvion is another mode of acquisition by the same code. Alluvion is an addition of soil to land by a river, so gradual that in short periods the change is imperceptible; or, to use the common expression, a latent addition.

§ 71. Quod si flumen partem aliquam ex tuo praedio de*traxe*rit et ad meum praedium *a*ttulerit, haec pars tua manet.

§ 71. But a parcel of your land swept away by a river, and carried down to mine, continues your property.

§ 72. At si in medio flumine insula nata sit, haec eorum omnium commun*is* est qui ab utraque parte fluminis prope ripam praedia possident. si vero non sit in medio flumine, ad eos pertinet qui ab ea parte quae proxuma est iuxta ripam praedia habent.

§ 72. An island that rises in the middle of a river is the common property of the proprietors on both banks of the river; if it is not in the middle of the stream, it belongs to the proprietors of the nearer bank.

§ 73. Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit.

§ 73. Again, a building erected on my soil, though in the name and for the use of the builder, belongs to me by the natural code; for the ownership of a superstructure follows the ownership of the soil.

§ 74. Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radicibus terram complexa fuerit.

§ 74. The same occurs a fortiori when trees are planted on my land, as soon as they strike root.

§ 75. Idem contingit et in *fru*mento quod in solo nostro ab aliquo satum fuerit.

§ 75. Similarly, when corn is sown on my land.

§ 76. Sed si ab eo petamus fructum vel aedificium, et inpensas in aedificium vel in seminaria vel in sementem factas ei solvere nolimus, poterit nos per exceptionem doli repellere; utique si bonae fidei possessor fuerit.

§ 76. But if I bring an action to recover the produce or the building, and refuse to compensate the other party for his outlay on the building or the plantation or the cornfield, he will defeat my action by the plea of fraud, if he was an innocent possessor.

§ 77. Eadem ratione probatum est, quod in c*h*artulis sive mem-

§ 77. Similarly, the writing inscribed on my paper or parchment,

branis meis aliquis scripserit, licet aureis litteris, meum esse, quia litterae chartulis sive membranis cedunt. itaque si ego eos libros easque membranas petam, nec inpensam scripturae solvam, per exceptionem doli mali summoveri potero.

even in letters of gold, is acquired to me, for the property in the letters follows the property in the paper or parchment; but if I sue for the books or parchment without offering compensation for the writing, my action will be defeated by the plea of fraud.

§ 78. Sed si in tabula mea aliquis pinxerit velut imaginem, contra probatur: magis enim dicitur tabulam picturae cedere. cuius diversitatis vix idonea ratio redditur. certe secundum hanc regulam si me possidente petas imaginem tuam esse, nec solvas pretium tabulae, poteris per exceptionem doli mali summoveri. at si tu possideas, consequens est, ut utilis mihi actio adversum te dari debeat: quo casu nisi solvam impensam picturae, poteris me per exceptionem doli mali repellere, utique si bona fide possessor fueris. illud palam est, quod sive tu subripuisses tabulam sive alius, conpetit mihi furti actio.

§ 78. The canvas belonging to me, on which another man has painted a picture, is subject to a different rule, for the ownership of the canvas is held to follow the ownership of the painting: a difference which scarcely rests on a sufficient reason. By this rule, if I am in possession, and you claim the painting without offering the price of the canvas, I may defeat your claim by the plea of fraud. If you are in possession, I may claim the reconveyance of the canvas in a modified action, but unless I offer the price of the painting, you defeat me by pleading fraud, if you are an innocent possessor. It is certain, that, if you or another purloined the canvas, I can bring an action of theft.

§ 79. In aliis quoque speciebus naturalis ratio requiritur: proinde si ex uvis *aut olivis aut spicis* meis vinum aut oleum aut frumentum feceris, quaeritur utrum meum sit id vinum aut oleum aut frumentum, an tuum. item si ex auro aut argento meo vas aliquod feceris, aut ex meis tabulis navem aut armarium aut subsellium fabricaveris; item si ex lana mea vestimentum feceris, vel si ex vino et melle meo mulsum feceris, sive ex medicamentis meis emplastrum aut collyrium feceris: *quaeritur, utrum tuum sit id quod ex meo effeceris*, an meum. quidam materiam et substantiam spectandam esse putant, id est, ut cuius materia sit, illius et res quae facta sit videatur esse; idque maxime placuit Sabino et Cassio. alii vero *eius rem* esse pu-

§ 79. On a change of species, also, we have recourse to natural law to determine the proprietor. Thus, if grapes, or olives, or sheaves, belonging to me, are converted by another into wine, or oil, or corn, a question arises whether the property in the corn, wine, or oil, is in me, or in the author of the conversion; or if my gold or silver is manufactured into a vessel, or a ship, chest, or chair is constructed from my timber, or my wool is made into cloth, or my wine and honey are made into mead, or my drugs into a plaster or eye-salve, it becomes a question whether the property in the new product is vested in me or in the manufacturer. According to some, the material or substance is the criterion; that is to say, the owner

tant qui fecerit; idque maxime diversae scholae auctoribus visum est: sed eum quoque cuius materia *et* sub*stantia* fu*e*rit, furti adversus eum qui subripuerit habere actionem; nec minus adversus eundem condictionem ei competere, qui*a* extinct*ae* res, licet vindicari non pos*sint*, condici tamen furibus et quibusdam aliis possessoribus possunt.

of the material is to be deemed the owner of the product; and this was the doctrine of Sabinus and Cassius; according to others, the ownership of the product is in the manufacturer, and this was the doctrine of the opposite school; who also held that the owner of the substance or material could maintain an action of theft against the purloiner, or an action for reconveyance, because, though the destruction of property is a bar to a vindication, it is no bar to a reparative personal action 4 § 5) against the thief and certain (other possessors.

§ 65. Tradition or transfer of possession, as we have seen, was admitted in the civil law as a mode of transferring quiritary property in such non-mancipable things as were corporeal: in mancipable things it could only transfer bonitary property. In Justinian's time Tradition had superseded Surrender in court and Mancipation; and transfer of possession was the universal solemnity for transfer of dominion.

If we consider Surrender, Mancipation, Tradition, we shall see that they are only three forms of one identical title, Alienation. The substance or essence of the title, the intention on the one side to transfer property, on the other to accept it, is the same in all three; it is only the adventitious or accidental or evidentiary (3 § 92) portion of the title in which they differ.

Although delivery of possession, like the solemnities of mancipation and surrender, is, as compared with the will or intention of the parties, only an evidentiary and symbolic part of the title, yet both parcels, the external as well as the internal act, are indispensable in the transfer of dominion. Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur, Cod. 2, 3, 20. 'Tradition and usucapion, not naked convention, operate a transfer of dominion.' We have already noticed exceptions to this rule in the case of servitus, hypotheca, societas, 2 § 31. Again, Nunquam nuda traditio transfert dominium sed ita si venditio vel aliqua justa causa praecesserit propter quam traditio sequeretur, Dig. 41, 1, 31. 'Naked delivery does not transfer property, but must be based on contract of sale or some other sufficient inducement.' It is clear that mere

Tradition, or transfer of physical control, without any further element of Title, cannot pass Dominion, for in Loan for use (commodatum) tradition merely passes Detention without Possession; in Pledge (pignus), it passes Possession without Property; in Deposit, it sometimes passes Detention and sometimes Possession. The cases in which Property is passed by Tradition may be reduced to three classes, traditio donandi animo, traditio credendi animo, and traditio solvendi animo. In the first, it simply confers property on the donee; in the second, it confers property on the transferee, and subjects him to an obligation; in the third, it confers property on the transferee, and discharges the transferor of an obligation. In the two latter cases, i. e. tradition by way of loan (mutui datio) and tradition by way of payment (solutio), the titulus, or justa causa accompanying tradition, contains much that is unessential to the transfer of dominion, the only absolutely essential element being the intention of the parties to give and take dominion. In Donation, the justa causa traditionis consists solely of this essential element. The justa causa, then, which must accompany tradition, is the animus or voluntas transferendi dominii, and this, apparently, is given as the whole of the matter in a passage of Gaius quoted in the Digest: Hae quoque res, quae traditione nostrae fiunt, jure gentium nobis acquiruntur; nihil enim tam conveniens est naturali aequitati, quam voluntatem domini volentis rem suam in alium transferre ratam haberi, Dig. 41, 1, 9, 3. 'Tradition is a natural mode of acquisition, for it is a plain dictate of reason that the will of an owner to transfer his ownership to another should be allowed to take effect.'

Delivery sometimes precedes the intention to transfer, for instance, in a conditional sale: in which case the transfer of property is suspended until the condition is fulfilled.

The transferee may be an incerta persona; for instance, when money is scattered among a mob by a praetor or consul (missilium jactus), Inst. 2, 1, 46.

Herein Dominion (jus in rem) differs from Obligation (jus in personam). When an Obligation is created, the payee or creditor or person on whom a right is conferred, cannot be incerta persona; at least jurisprudence had not recognized an obligation or personal right vested in incerta persona before the invention of papers payable to the holder or bearer: and here the admissibility of incerta persona as creditor is effected by the introduction of jus in rem into

jus in personam. The incorporeal obligation (jus in personam), is, as it were, incorporated in a document, a subject of ownership (jus in rem), and ownership of the document is deemed to be investiture with the obligation. The emission of the Obligations (papers) now resembles the jactus missilium; the bank, company, or government, that issues the obligations, treats detention of the document as presumptive evidence of ownership, and discharges its obligation by paying whoever presents the paper for payment. In these contracts the payee, promisee, or creditor, is only defined by the class term 'bearer' or 'holder,' i.e. is an incerta persona, individually unknown to the debtor before the moment of presentation.

One act of assent may suffice as the antecedent to many acts of prehension; for instance, in the acquisition (perceptio) of fruits by a lessee (colonus) or usufructuary. Here the delivery (apprehensio) occurs from time to time; the will or intention of the original proprietor was manifested once for all when he created the usufruct or lease. If the fructus are res nec-mancipi, perception gives the lessee dominion: if they are res mancipi, perception gives the lessee bona fide possession, which usucapio will ripen into dominion.

Mere severance (separatio) of fruits (fructus) from the soil or parent substance, without either constructive delivery (traditio) or apprehension (perceptio), gives to the bona fide possessor, according to Savigny, Besitz, 22 *a*, bona fide possession, which will be transformed into property by usucapion: according to Vangerow, § 326, it gives him immediate and plenary property.

If the true owner recovers the land or cattle by vindicatio, the judex will compel the bona fide possessor to restore the unconsumed fruits (fructus extantes) but not to make compensation for the consumed fruits (fructus consumpti). The mala fide possessor, on the contrary, acquires no property in the consumed fruits, but is compelled either by the vindicatio by which the principal thing is recovered or by a separate personal action (condictio) to restore their value; he is compelled to restore the fructus extantes either by the principal vindicatio or by a separate vindicatio. He can be sued for the value of the fruits he has neglected to gather (fructus neglecti) only in the principal vindicatio: their non-existence prevents his being sued for them in a separate vindicatio; and the fact that he is not enriched by them prevents his being sued for them in a separate condictio, Savigny, System, § 267.

In one case the operation, even of contract and delivery combined, is limited by the Twelve Tables, namely, in Sale. Here it is provided that tradition shall not operate a transmutation of property without a further condition—payment of the purchase money, unless the sale is intended to be a sale on credit, Inst. 2, 1, 41.

Tradition in Roman law was never fictitious; it was always an actual delivery of a power of physical or corporeal control. In English law, indeed, conveyance by a deed under the Statute of Uses is said to transfer possession; but this is impossible: the physical fact of possession can no more be produced by writing on a parchment, than ignition, or explosion, or chemical decomposition can be produced by writing on a parchment, or by any other than its appropriate antecedent. The possession conveyed by assurance under the Statute of Uses is merely a fictitious possession; and instead of saying that the deed passes possession, it would be nearer the truth to say that, in respect of a conveyance under the Statute of Uses, all those parts of the law are deemed to be expunged which make the rights and duties of the alienee dependent on possession. By this statute property in land, which before could only be transferred by tradition (livery of seisin), became transferable by a mere translative contract (bargain and sale).

Although we have not yet arrived at the subject of Obligation, we may here by way of anticipation observe that in dispositions creating a jus in personam Traditio plays a no less important part than in dispositions creating a jus in rem, as we shall see when we have to deal with contracts Real innominate. In these contracts Traditio, superseding Stipulation and other symbolic Forms, is the element which differentiates a pactum nudum from a pactum vestitum, i.e. which makes a convention enforcible by the public tribunals. For the present it may suffice to quote the words of Gaius as given in the Digest: In traditionibus rerum quodcunque pactum sit id valere manifestissimum est, D. 2, 14, 48. 'The conventions that accompany a delivery of possession are certainly valid.'

For a further examination of the nature of Possession, see the theory of the possessory interdicts, Book 4.

§ 66–69. Occupation gives property in a thing which previously has no proprietor. Quod enim ante nullius est, id naturali ratione occupanti conceditur, Inst. 2, 1, 12. If a thing had already an owner, it is only after dereliction by him that it can be appropriated

by occupation. Dereliction, or renunciation of property, requires both the intention to abandon it and an external action. Thus the casting overboard of articles in a tempest to lighten a ship is not dereliction, as there is no intention of abandoning the property in the event of salvage, Inst. 2, 1, 48. Nor does the mere intention of abandonment constitute dereliction of property without a throwing away or removal or some other external act; and herein dereliction of property differs from dereliction of possession, which does not require this second element. Differentia inter dominium et possessionem haec est quod dominium nihilo minus ejus manet qui dominus esse non vult, possessio autem recedit ut quisque constituit nolle possidere, Dig. 41, 2, 17. 'There is this difference between dominion and possession, that dominion continues after the will to own has ceased, whereas possession ceases with the cessation of the will to possess.'

§ 68. Among wild animals (ferae naturae) a distinction is to be drawn. In those of them that are half tamed (mansuefactae), among which are mentioned deer, peacocks, pigeons, bees, property is not limited by detention, as in other wild animals, but by animus revertendi. A migrating swarm (examen) of bees, accordingly, would only continue to belong to the owner of the hive as long as it continues in his sight and is easy to recapture, as it has no intention of returning. In tame animals, e. g. dogs or geese, the rights of the owner are not extinguished by their straying without an intention to return.

§ 70–78. The intimate conjunction of two things, so that they are no longer separable and restorable to their former condition, produces a transmutation of property. A separable junction (commixtio), as when two flocks of sheep are intermingled, or when a stone is set in a ring, or when two metals are soldered together (plumbatura) or are fused but may be chemically separated, produces no change of property. In one case, however, namely, when material has been used in building a house or cultivating a vineyard, although the property of the owner continues, the Twelve Tables deprive him of the right to demand its separation by real action (vindicatio), and only allow him to bring the action de tigno juncto aedibus vel vineae and recover double the value.

An inseparable union sometimes produces co-ownership in the whole (condominium or communio), sometimes the exclusive ownership of one of the parties (accessio).

When two things belonging to different owners are mixed but neither produce a new species (confusio), nor the relation of principal and accessory, e. g. when two similar wines or metals are mixed; or when a new species is produced with the consent of both owners, as when mead is produced by mixing honey and wine, electrum by mixing gold and silver; then each owner loses his separate ownership of a part, and becomes joint owner of the whole.

When a new species is produced by one owner without the consent of the other, then the exclusive ownership is vested in the producer, and the other can only obtain redress for the expropriation or loss of his ownership.

Further, when the mixture establishes the relation of principal and accessory, that is, when one thing loses its independent existence and becomes a part of the other (accessio), then the property in the whole is vested in the proprietor of the dominant part; e. g. the property in the ship follows the property in the keel, proprietas totius navis carinae causam sequitur, Dig. 6, 1, 61. It will sometimes be a question which part is to be regarded as principal and which as accessory, and the solution does not always depend on their comparative value. Sometimes the relation of substance and accident prevails, for instance, in a tapestry the property in the embroidery follows the property in the wool. Sometimes the comparative value decides; for instance, the property in the canvas follows the property in the painting: and this seems more rational, though Gaius appears to think that a picture ought to be governed by the analogy of a manuscript, where the property in the writing follows the property in the paper.

§ 78. The remedy of the ex-proprietor of the accessory is an in factum actio (4 § 46), Dig. 6, 1, 33, 5. Ulpian, Dig. 6, 1, 5, 3, speaks of a real action (utilis in rem actio), which, as a real action implies that the plaintiff is proprietor, seems to mean a Fictitious action, 4 § 34, i. e. one whose formula feigns that the property was never devested by Accession. This may be what Gaius means by utilis actio.

§ 79. Specification or labour is a title which cannot without violence be brought under either Occupatio or Accessio. Here one person contributes only his labour, whereby he transforms the material or materials belonging to another into a new product (nova species). The Sabinians held that the product belonged (by

Accessio?) to the owner of the matter, the Proculeians (by Occupatio?) to the producer of the form. Justinian adopts an intermediate opinion, which Gaius mentions, Dig. 41, 1, 7, 7, that the product belongs to the producer, provided that it cannot be reduced to the original substance, in which case it belongs to the owner of that substance; e.g. a vessel belongs to the owner of the gold or silver out of which it was made: and provided further that the change is a genuine fabrication or manufacture; for instance, the mere thrashing out of corn is not sufficient to change the ownership, and therefore the corn belongs to the owner of the sheaves: and the mere dying of wool operates no transfer of ownership to the dyer, D. 41, 1, 26, 3.

In the subjoined synopsis of the various titles to dominion which have been considered the proper position of Specification is open to controversy.

Acquisition is either Derivative (implying Succession) or Original.

Derivative acquisition is Alienation: which includes In jure cessio, Mancipatio, Traditio, Fructuum perceptio, Adjudicatio.

Original acquisition is either independent of Possession or depends on Possession.

Original acquisition independent of Possession is either the effect of Separation or of Conjunction.

Separation is a title to property in the case of Separatio fructuum, which confers property in the fruits on the bona fide possessor.

Conjunction is either the conjunction of equal with equal or the conjunction of accessory with principal.

The conjunction of equal with equal is seen in Confusio, which produces communio or co-proprietorship.

The conjunction of accessory with principal is either of immovable with immovable, instanced in Alluvio:

or of movable with immovable, instanced in Satio, Plantatio, Inaedificatio:

or of movable with movable, instanced in Scriptura, Pictura:

or of matter with form, seen in Specificatio.

Original acquisition dependent on Possession is either further dependent on Time or is not dependent on Time.

Original acquisition dependent on Possession and further dependent on Time is seen in Usucapio and Praescriptio.

Original acquisition dependent on Possession but independent of Time is seen in Occupatio, including Captio ferarum, Captio hostilis, Inventio derelicti, Inventio thesauri.

DE PUPILLIS AN ALIQUID A SE ALIENARE POSSUNT.

§ 80. Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem mancipi alienare posse; nec mancipi vero feminam quidem posse, pupillum non posse.

§ 81. Ideoque si quando mulier mutuam pecuniam alicui sine tutoris auctoritate dederit, quia facit eam accipientis, cum scilicet *ea* pecunia res nec mancipi sit, contrahit obligationem.

§ 82. At si pupillus idem fecerit, quia *eam pecuniam non facit accipientis*, null*am* cont*ra*hit obligationem. unde pupillus vindicare qui*dem* nummos suos potest, sicubi extent, id est *intendere suos ex iure Quiritium esse; mala fide consumtos vero ab eodem* repetere potest *quasi possideret. unde* de pupillo quidem quaeritur, an num*mos quoque* quo*s* mutuos dedit, ab eo qui accepit *bona fide* alien*ato*s p*etere* possit, quoniam *is scilicet accipientis eos nummos facere videtur.*

§ 83. *At ex contrario res tam*

WHETHER WARDS CAN ALIENE.

§ 80. We must next observe, that neither a woman nor a ward can aliene a mancipable thing without their guardian's authority: a ward cannot aliene a non-mancipable thing without the guardian's authority, a woman can.

§ 81. Thus a woman lending money without the guardian's authority passes the property therein to the borrower, money being a non-mancipable thing, and imposes a contractual obligation.

§ 82. But a ward lending money without his guardian's authority does not pass the property, and does not impose a contractual obligation, and therefore he can recover back the money, if it exists, by real action, that is, by claiming it as quiritary proprietor; if it has been fraudulently consumed, he can claim it as if it were still in the possession of the borrower; whether he can if it has been innocently aliened by the borrower, who thus has passed the property to the alienee, is a controversy.

§ 83. On the contrary, both man-

mancipi quam nec mancipi mulie*ribus* et pupillis *sine* tutoris auctoritate solvi possunt, quoniam meliorem condicionem suam facere iis etiam sine tutoris auctoritate concessum est.

§ 84. Itaque si debitor pecuniam pupillo solvat, facit quidem pecuniam pupilli, sed ipse non liberatur, quia nullam obligationem pupillus sine tutoris auctoritate dissolvere potest, quia nullius rei alienatio ei sine tutoris auctoritate concessa est. set tamen si ex ea pecunia locupletior factus sit, et adhuc petat, per exceptionem doli mali summoveri potest.

§ 85. Mulieri vero etiam sine tutoris auctoritate recte solvi potest: nam qui solvit, liberatur obligatione, quia res nec mancipi, ut proxume diximus, a se dimittere mulier et sine tutoris auctoritate potest: quamquam hoc ita est, si accipiat pecuniam; at si non accipiat, *sed* habere se dicat, et per acceptilationem velit debitorem sine tutoris auctoritate liberare, non potest.

cipable and non-mancipable things can be conveyed to women and wards without their guardian's authority, because they do not require his authority to better their position.

§ 84. Accordingly, a debtor who pays money to a ward passes the property therein to the ward, but is not discharged of his obligation, because a ward cannot release from any liability without his guardian's authority, as without such authority he cannot aliene any right: if, however, he profits by the money, and yet demands further payment, he may be barred by plea of fraud.

§ 85. A woman may be lawfully paid without her guardian's authority, and the payer is discharged of liability, because, as we lately mentioned, a woman does not need her guardian's authority for the alienation of a non-mancipable right, provided always that she receives actual payment: for if she is not actually paid, she cannot feign receipt and release her debtor by fictitious acknowledgment (3 § 169) without her guardian's authority.

§ 82. For mutuum, see 3 § 90. If the money delivered by a ward could be traced it was recoverable by real action (vindicatio): if it had been consumed in bona fides a personal action, condictio certi, would lie to recover an equivalent sum: if it had been consumed in mala fides a personal action, ad exhibendum, would lie to recover an equivalent sum and damages, Inst. 2, 8, 2.

§ 85. The pupilage of women after attaining the age of twelve, i.e. the age of puberty, had become obsolete before the time of Justinian, and with it their incapacities of alienation.

PER QUAS PERSONAS NOBIS ADQUIRATUR.

§ 86. Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipiove habemus; item per eos servos in quibus usumfruc-

§ 86. We may acquire property not only by our own acts but also by the acts of persons in our power, hand, or mancipation; further, by slaves in whom we have a usufruct;

tum habemus; item per homines liberos et servos alienos quos bona fide possidemus. de quibus singulis diligenter dispiciamus.

§ 87. Igitur *quod* liberi nostri quos in potestate habemus, item quod servi *nostri* mancipio accipiunt, vel ex traditione nanciscuntur, sive quid stipulentur, vel ex aliqualibet causa adquirunt, id nobis adquiritur: ipse enim qui in potestate nostra est nihil suum habere potest, et ideo si heres institutus sit, nisi nostro iussu, hereditatem adire non potest; et si iubentibus nobis adierit, hereditatem nobis adquirit proinde atque si nos ipsi heredes instituti essemus. et convenienter scilicet legatum per eos nobis adquiritur.

§ 88. Dum tamen sciamus, si alterius in bonis sit servus, alterius ex iure Quiritium, ex omnibus causis ei soli *per* eum adquiri cuius in bonis est.

§ 89. Non solum autem proprietas per eos quos in potestate habemus adquiritur nobis, sed etiam possessio: cuius enim rei possessionem adepti fuerint, id nos possidere videmur: unde etiam per eos usucapio procedit.

§ 90. Per eas vero personas quas in manu mancipiove habemus, proprietas quidem adquiritur nobis ex omnibus causis, sicut per eos qui in potestate nostra sunt: an autem possessio adquiratur, quaeri solet, quia ipsas non possidemus.

§ 91. De his autem servis in quibus tantum usumfructum habemus ita placuit, ut qui*d*quid ex re nostra vel ex operis suis adquirunt, id nobis adquiratur; quod vero extra eas causas, id ad dominum proprietatis pertineat. itaque si iste se*r*vus heres institutus sit legatumve quod ei datum fuerit, non mihi,

further, by freemen or slaves belonging to another if we are innocent possessors: and let us now examine these cases in detail.

§ 87. The rights of property which children under power or slaves acquire by mancipation or tradition, the rights to a service they acquire by stipulation, and all rights they acquire by any other title, are acquired for their superior; for an inferior is incapable of holding property, and if instituted heir he must have the command of his superior to be capable of accepting the inheritance, and if he has the command of the superior and accepts the inheritance, it is acquired for the superior just as if he himself had been instituted heir: and the same occurs in the case of a legacy.

§ 88. When one man is bonitary proprietor of a slave and another quiritary proprietor, whatever the mode of acquisition, it enures exclusively to the bonitary proprietor.

§ 89. Not only property is acquired for the superior but also possession, for the detention of the inferior is deemed to be the possession of the superior, and thus the former is to the latter an instrument of usucapion.

§ 90. Persons in the hand or mancipation of a superior acquire dominion for him just as persons in his power; whether they acquire possession for him, is a controversy, not being themselves in his possession.

§ 91. Respecting slaves in whom a person has only a usufruct, the rule is, that what they acquire by administering the property of the usufructuary or by their own labour is acquired for the usufructuary; but what they acquire by any other means belongs to their proprietor (the reversioner). Accordingly, if

sed domino proprietatis adquiritur.

such a slave is instituted heir or made legatee, the succession or legacy is acquired, not to the usufructuary, but to the proprietor.

§ 92. Idem placet de eo qui a nobis bona fide possidetur, sive liber sit sive alienus servus. quod enim placuit de usufructuario, idem probatur etiam de bona fide possessore. itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus sit.

§ 92. The innocent possessor of a freeman or a slave belonging to another has the same rights as a usufructuary; what they acquire by any other title than the two we mentioned, belonging in the one case to the freeman in the other to the true proprietor.

§ 93. Sed si bonae fidei *possessor usuceperit servum*, quia eo modo dominus fit, *ex* omni causa per eum sibi adquirere potest: usufructuarius vero usucapere non potest, primum quia non possidet, se*d* habet ius utendi et fruendi; deinde quia scit alienum servum *esse*.

§ 93. After a bona fide possessor has acquired the ownership of a slave by usucapion, all acquisitions by the slave enure to his benefit. A usufructuary cannot acquire a slave by usucapion, for, in the first place, he has no true possession, but only a quasi possession of a servitude; in the second place, he is aware of the existence of another proprietor.

§ 94. De illo quaeritur, an per eum servum in quo usumfructum habemus possidere aliqu*am* rem et usucapere possumus, quia ipsum non possidemus. Per eum vero quem bona fide possidemus sine dubio et possidere et usucapere possumus. loquimur autem in utriusque person*a* secundum d*istinc*tionem quam proxume exposuimus, id est si qui*d* ex re nostra vel ex operis suis adquirant, id nobis adquiritur.

§ 94. It is a question whether a slave can be an instrument of possession and usucapion to a usufructuary, not being himself in his possession. A slave, undoubtedly, can be the instrument of possession and usucapion to a bona fide possessor. Both cases are limited by the distinction recently drawn, that is, the proposition is confined to the things acquired by the slave in the administration of a party's property or by his own labour.

§ 95. Ex his apparet per liberos homines, quos neque iuri nostro subiectos habemus neque bona fide possidemus, item per alienos servos, in quibus neque usumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri p*osse*. *et hoc est quod dici*tur per extraneam personam nihil adquiri *posse, excepta possessione, de ea enim* quaeritur, anne *per liberam personam n*obis adquiratur.

§ 95. It appears that freemen not subject to my power nor in my innocent possession, and my neighbour's slave of whom I am neither usufructuary nor just possessor, cannot under any circumstances be instruments of my acquisition, and this is the import of the dictum that a stranger cannot be an instrument in the acquisition of anything except, perhaps, possession; for in respect of possession there is a controversy whether an inde-

pendent person can be instrumental in its acquisition.

§ 96. In summa sciendum *est* iis *qui in* potestate manu mancipiove sunt nihil in iure cedi posse. cum enim *istarum* personarum nihil suum esse possit, conveniens est scilicet, ut nihil *suum esse per* se in iure vindicare possint.

§ 96. Finally, it is to be observed that persons under power, in hand, or in bondage, cannot acquire by surrender before a magistrate, for, being incapable of ownership, they are incompetent to bring a claim of ownership before a tribunal.

§ 87. Manus and mancipium had ceased to exist before the time of Justinian, and patria potestas was much reduced. Originally, the filiusfamilias was incapable of property: in the peculium, the goods he was allowed to administer, he had no property nor even possession, 4 § 148, but merely detention. The military profession were the first to emerge from this position of inferiority, and in respect of peculium castrense the filiusfamilias was deemed to have the status of paterfamilias. By the introduction of peculium quasi castrense this privilege was extended to certain civil functionaries and liberal professions: and by inventing peculium adventitium Justinian still further emancipated the filiusfamilias. Peculium adventitium, as opposed to peculium profectitium, was what came to the son from any other source than the estate and permission of the father: in respect of peculium profectitium the old law continued in force; the paterfamilias remained absolute proprietor: but in respect of peculium adventitium the right of the father was reduced to a life estate or usufruct: in respect of the fee or reversion in remainder after this life estate the filiusfamilias was proprietor, Inst. 2, 9, 1. The reduction of patria potestas, and the abolition of the dependent law of Agnation, may be almost regarded (so fundamental were these institutions in jus civile) as the abrogation of the civil law, and the substitution in its stead of what the Romans called jus gentium or the law of nature.

§ 94. The question whether an usufructuary slave may be an instrument of acquiring possession is decided in the affirmative, Dig. 41, 2, 1, 8.

§ 95. All Dispositions or modes of conferring either rights against one (jus in personam), or rights against the world (jus in rem), are divisible, as we have before mentioned, into two parcels; an essential portion, some mental or internal act, the Intention of the parties; and an evidentiary portion, the Execution of this intention, its incorporation in some overt act. Can these elements

of title be contributed by different persons? Can the Intention of disposing, that is, of acquiring or aliening, reside in one, and can its Execution, its external manifestation, be delegated to a representative?

Originally, that is, under the ancient civil law, representation was only admitted when the representative was in an inferior status to the principal, was his slave, or subject to his potestas, manus, or mancipium. This limitation was found to be inconvenient, when, in the progress of Roman conquest, Roman citizens became proprietors in remote parts of the world; and Possession was allowed to be acquirable by the instrumentality of libera persona, that is, of a person who stood in no relation of inferiority to the acquirer. In a civil solemnity, like mancipation, a man could not be represented by an independent agent; but when, subsequently, the transfer of possession became the universal mode of transferring dominion, it followed that Property, as well as Possession, could be acquired by the agency of libera persona. Si procurator rem mihi emerit ex mandato meo, eique sit tradita meo nomine, dominium mihi et proprietas acquiritur etiam ignoranti, Dig. 41, 1, 13. 'If an agent buys a thing by my instructions, and receives possession thereof in my name, the dominion and property is acquired for me even without notice of his act.' Per liberam personam ignoranti quoque adquiri possessionem et, postquam scientia intervenerit, usucapionis conditionem inchoari posse, tam ratione utilitatis quam jurisprudentia receptum est, Cod. 7, 32, 1. 'An independent person may be an instrument whereby, without notice, a principal may acquire possession, and, after notice, may commence usucapion; as is established both by motives of convenience and principles of jurisprudence.' Notice was required for usucapion, because, as we have seen, usucapion requires bona fides.

The acquisition of Obligations or personal rights by brokerage of an independent agent was less perfectly developed. Originally, the process employed was a duplication of the relation of agency (mandatum). A as principal (dominus) appointed B his agent (procurator). B then contracted with a third party in his own name, and, in order to transfer the benefit of his contract to A, he ceded to him his right of action, that is to say, B, as principal, in his turn made A his agent (procurator in rem suam), whereby A was able to sue in the name of B, and obtain judgment in the name of A. Finally, the praetor allowed the principal to sue immediately, with-

out this cession of actions, by bringing a utilis actio, i.e. a fictitious action, or action which feigned that the cession had taken place, or rather, that the principal had been the immediate contractor, not represented by an agent. But this fiction was only required in respect of contracts governed by principles of civil law, i.e. the Formal contracts, of which at last the only instance was Stipulatio. In Formless contracts, or contracts governed by jus gentium, the agent was a mere conduit pipe; the principal acquired an immediate right or obligation, without Cession and without Fiction. Ea quae civiliter adquiruntur, per eos qui in potestate nostra sunt adquirimus, veluti stipulationem; quod naturaliter adquiritur, sicuti est possessio, per quemlibet, volentibus nobis possidere, adquirimus, Dig. 41, 1, 53. 'Rights obtained by civil titles can only be acquired by the mediation of persons in our power; for instance, rights by stipulation: rights obtained by natural titles, such as the right of possession, are acquirable through any agent that we choose to employ.' See 3 § 163, to which place this topic more properly belongs.

§ 96. We might have expected that, as inferiors can acquire for their superiors by Mancipatio, 2 § 87, so they could also acquire by In jure cessio, especially as the same form of words: Hunc ego hominem ex jure Quiritium meum esse aio: was used in Mancipatio, 1 § 119, and in Vindicatio, 4 § 16. It seems, however, that in Mancipatio the formula could be changed to: Hanc rem ex jure Quiritium Lucii Titii domini mei esse aio, 3 § 167; and that a similar modification was not admissible in the legis actio. It follows that an inferior (filius, mancipium, or servus) could acquire for his superior rural servitudes, but not urban or personal servitudes, 2 § 29, 30; not, that is to say, as res singulae: for as parts of a rerum universitas these and all other rights could be acquired for a superior by an inferior by making aditio of an hereditas with the sanction of the superior, 2 § 188; and even as res singulae these rights could be acquired for a superior by an inferior by title of legatum; that is, if they are conferred by a testator on the inferior as legatarius, Vat. frag. 51.

As a Rerum universitas includes Obligations (res incorporalis), active and passive, as well as Dominion (res corporalis), the consideration of Obligation should, theoretically speaking, precede the consideration of Rerum universitas; in an elementary exposition like the present, however, no practical inconvenience is occasioned

by postponing the consideration of Obligations, the remaining branch of Res singulae, while we gain by exhausting the subject of jus in rem before proceeding to the examination of jus in personam. [Passive obligation means an obligation viewed from the side of the debtor: Active obligation an obligation viewed from the side of the creditor; otherwise called a Right.]

We may remember that Rerum universitas, as well as Servitudes and Obligations, was included by the Romans under the term Res incorporalis, 2 § 14. The whole division of rights, however, into Res corporalis and Res incorporalis is unsatisfactory; for, as we have already noticed, it was only from confusion of thought that Dominion was held to be Res corporalis; and all Rights are, really, Res incorporales.

QUIBUS MODIS PER UNIVERSITATEM RES ADQUIRANTUR.

§ 97. *Hactenus* tantisper admonuisse sufficit quemadmodum SINGULAE res nobis adquirantur. nam legatorum ius, quo et ipso singulas res adquirimus, opportunius alio loco referemus. Videamus itaque nunc quibus modis per UNIVERSITATEM res nobis adquirantur.

§ 97. So much at present respecting the modes of acquiring SINGLE rights; for bequest, another title whereby single rights are acquired, will find a more suitable place in a later portion of our treatise. We proceed to the titles whereby an AGGREGATE of rights is acquired.

§ 98. Si cui heredes facti sumus, sive cuius bonorum possessionem petierimus, sive cuius bona emerimus, sive quem adrogaverimus, sive qu*a*m in manum ut uxorem receperimus, eius res ad nos transeunt.

§ 98. If we become the successors, civil or praetorian, of a person deceased, or purchase the estate of an insolvent, or adopt a person sui juris, or receive a wife into our hand, the whole estate of those persons is transferred to us in an aggregate mass.

§ 99. Ac prius de heredita*t*ibus dispiciamus, quarum duplex condicio est: nam vel ex testamento, vel ab intestato ad nos pertinent.

§ 99. Let us begin with inheritances, whose mode of devolution is twofold, according as a person dies testate or intestate.

§ 100. Et prius est, ut de his dispiciamus quae nobis ex testamento obveniunt.

§ 100. And we first treat of acquisition by will.

DE TESTAMENTIS ORDINANDIS.

§ 101. Testamentorum autem genera initio duo fuerunt. nam aut calatis comitiis faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in

§ 101. Wills were originally of two kinds, being made either at the comitia calata, which were held twice a year for making wills, or in martial array, that is to say, in the

procinctu, id est cum belli causa *ad* pu*gn*am ibant: procinctus est enim expeditus et armatus exercitus. alterum itaque in pace et in otio faciebant, alterum in proelium exituri.

field before the enemy, martial array denoting an army clad and armed for battle. One kind, then, was used in time of peace, the other in time of war.

§ 102. Accessit deinde tertium genus testamenti, quod per aes et libram agitur. qui neque calatis comitiis neque in procinctu testamentum fecerat, is si subita morte urgebatur, amico familiam suam [id est patrimonium suum] mancipio dabat, eumque rogabat quid cuique post mortem suam dar*i* vellet. quod testamentum dicitur per aes et libram, scilicet quia per mancipation*e*m peragitur.

§ 102. More recently, a third kind was introduced, effected by bronze and balance. A man who had not made his will, either in the comitia calata or in martial array, being in apprehension of approaching death, used to convey his estate by mancipation to a friend, whom he requested to distribute it to certain persons in a certain manner after his death. This mode of testamentary disposition is called the will by bronze and balance, because it involves the process of mancipation.

§ 103. Sed ill*a* quidem duo genera testamentorum in desuetudinem abierunt: hoc vero solum quod per aes et libram fit in usu retentum est. sane nunc al*i*ter ordinatur atque olim solebat. namque olim familiae emptor, id est qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator, quid cuique post mortem suam dari vellet. nunc vero alius heres testamento instituitur, a quo etiam legat*a* relinquuntur, alius dicis gratia propter veteris iuris *i*mitationem familiae emp*t*or *ad*hibetur.

§ 103. The first two modes have fallen into desuetude, and that by bronze and balance, which alone survives, has undergone a transformation. In former times the vendee of the estate, the alienee by mancipation from the testator, was the successor, and received the testator's instructions respecting the disposition of his property after his death. At the present day, the person who is instituted successor, and who is charged with the execution of the bequests, is different from the person who, for form's sake, and in imitation of the ancient process, represents the purchaser.

§ 104. Eaqu*e* res ita agitur. Qui facit *testamentum*, *ad*hibitis, sicut in ceteris *m*ancipationibus, v testibus civibus Romanis pu*be*ribus et libripende, postquam tabulas testamenti scripse*rit*, *m*ancipat alicui dicis gratia familiam suam; in qua re his verbis familiae emptor utitur: FAMIL*IA*M PECUNIAMQUE TUAM ENDO MANDATELA TUTELA CUSTODELAQUE MEA *ESSE AIO EA*-*QUE*, QUO TU IURE TESTAMENTUM

§ 104. The proceedings are as follows: The testator having summoned, as is done in other mancipations, five witnesses, all Roman citizens of the age of puberty, and a holder of the balance, and having already reduced his will to writing, makes a fictitious mancipation of his estate to a certain vendee, who thereupon utters these words: 'Thy family and thy money into my charge, ward, and custody I

FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE, et ut quidam adiciunt, AENEAQUE LIBRA ESTO MIHI EMPTA. deinde aere percutit libram, idque aes dat testatori velut pretii loco. deinde testator tabulas testamenti tenens ita dicit: HAEC ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT ITA DO, ITA LEGO, ITA TESTOR, ITAQUE VOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE. et hoc dicitur nuncupatio. nuncupare est enim palam nominare; et sane quae testator specialiter in tabulis testamenti scripserit, ea videtur generali sermone nominare atque confirmare.

receive, and, in order to validate thy will conformably to Roman law, with this ingot, and'—as some continue—'with this scale of bronze, unto me be it purchased.' Then with the ingot he strikes the scale, and delivers the ingot to the testator, as by way of purchase-money. Thereupon the testator, holding the tablets of his will, says as follows: 'This estate, as in these tablets and in this wax is written, I so grant, so devise, so dispose; and do you, Quirites, so give me your attestation.' These words are called the nuncupation, for nuncupation signifies public declaration, and by these general words the specific written dispositions of the testator are published and confirmed.

§ 105. In testibus autem non debet is esse qui in potestate est aut familiae emptoris aut ipsius testatoris, quia propter veteris iuris imitationem totum hoc negotium quod agitur testamenti ordinandi gratia creditur inter familiae emptorem agi et testatorem: quippe olim, ut proxime diximus, is qui familiam testatoris mancipio accipiebat, heredis loco erat. itaque reprobatum est in ea re domesticum testimonium.

§ 105. For the part of witness, it is a disqualification to be in the power of the fictitious vendee or of the testator, because, the old proceeding furnishing the model, the whole testamentary process is supposed to be a transaction between the vendee and the testator; and in old times, as was just observed, the vendee was the testamentary successor; wherefore no person in the power of the vendee was a competent witness.

§ 106. Unde et si is qui in potestate patris est familiae emptor adhibitus sit, pater eius testis esse non potest: at ne is quidem qui in eadem potestate est, velut frater eius. Sed si filiusfamilias ex castrensi peculio post missionem faciat testamentum, nec pater eius recte testis adhibetur, nec is qui in potestate patris sit.

§ 106. Hence, if the vendee is a filiusfamilias, neither his father nor any one in his father's power, his brother, for instance, is competent to attest; and if a filiusfamilias, after his discharge from service, make a will of his military peculium, neither his father nor any one in his father's power is qualified to be a witness.

§ 107. De libripende eadem quae et de testibus dicta esse intellegemus; nam et is testium numero est.

§ 107. The same rules apply to the balance-holder, for the balance-holder is a witness.

§ 108. Is vero qui in potestate heredis aut legatarii est, cuiusve

§ 108. Not only is a person who is in the power of the heir or

heres ipse aut legatarius in potestate est, quique in eiusdem potestate est, adeo testis et libripens adhiberi potest, ut ipse quoque heres aut legatarius iure adhibeantur. sed tamen quod ad heredem pertinet quique in eius potestate est, cuiusve is in potestate erit, minime hoc iure uti debemus.

legatee, or a person who has power over the heir or legatee, or a person in the same power as the heir or legatee, capable of being witness or balance-holder, but the heir or legatee himself can act in this character. However, it is advisable that the heir, and those in his power, and the person in whose power he is, should not exercise their qualification.

§ 101. A will is thus defined by Ulpian: Testamentum est mentis nostrae justa contestatio, in id sollemniter facta, ut post mortem nostram valeat, 20, 1. 'A will is a duly attested declaration of intention, solemnly executed in order to operate after death.' So important is the institution of a heres to the validity of a will in Roman law, that a Roman testament might be simply defined the institution of a heres.

Testamentary disposition was an interference with the more ancient law of succession by descent or intestate devolution, and the diversion of property from the legal course of transmission seemed at first so great an innovation as to require legislative sanction. Accordingly, the will executed in the Comitia Calata, or convocation of the curiae, was really a private law; and even the will in procinctu, when we remember the original identity at Rome of the civil and military organization, may be regarded as a legislative act of the people in military convocation.

The latter form was familiar to the contemporaries of Cicero: Reprehendebat igitur Galbam Rutilius quod is . . . . duos filios suos parvos tutelae populi commendasset ac se, tanquam in procinctu testamentum faceret sine libra atque tabulis, populum Romanum tutorem instituere dixisset illorum orbitati, De Orat. 1, 53. 'Rutilius blamed the abject artifice of Galba in commending his children to the protection of the people, and, as if he was making a will on the eve of battle, without bronze ingot and scale or written tablets, exclaiming that he named the Roman people guardian of their orphanage.'

§ 102. The mancipatory will, or will by bronze and scale, probably began to supersede the older form as soon as the Twelve Tables had given legal force to the nuncupative part of mancipation (Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto,

Festus. 'In contract or conveyance by bronze and balance, the oral declaration shall have legal force,') and had expressly recognized in every paterfamilias a power of testamentary disposition (Uti legassit super familia, pecunia, tutelave suae rei, ita jus esto, Ulpian, 11, 14. 'The directions of a testator respecting his family, property, and the guardianship of his children, shall be carried into effect).'

§ 103. The introduction of writing marks an era in mancipatory wills. Originally, the testator gave oral instructions to the familiae emptor in the presence of the witnesses respecting the distribution of his estate. These oral instructions, forming the lex mancipii, or conditions of the conveyance, were called the nuncupatio. Afterwards, for the sake of secresy, the testator committed his intentions to writing, and the nuncupation became a mere form of publication, or general ratification of the directions contained in the tablets which the testator held in his hand. It was probably in part, as Theophilus says, with the same view of concealing the testator's intentions, that the familiae emptor was separated from the heres, but in part also to enable the testator to institute as heres a person who from infancy or any other disability was incapable of co-operating in a mancipation.

§ 105. It is an intelligible rule, that a person interested in the validity of a will should be incompetent as a witness; and, when the familiae emptor was the heir, it was reasonable to disqualify for attestation any one united in interest to the familiae emptor. But when the mancipation was purely fictitious (imaginaria mancipatio, Ulpian, 20, 3; imaginaria venditio, Inst. 2, 10, 1), and the imaginary vendee distinct from the heir, the continuance of this disqualification shows the tendency of the Romans to venerate rules after the principles on which they were founded had ceased to operate. In the meantime the heir, who was really interested, was competent to be a witness. Cicero, for instance, mentions that he and Clodius were both witnesses to a will in which they were appointed heirs, Pro Milone, 18, 48. Thus the dispositions of the legislator were deranged and stultified: totum jus conturbatum erat, Inst. 2, 10, 10: the transference of interest from the familiae emptor to the heres not being accompanied by a corresponding transference of testimonial disqualification from the relatives of the familiae emptor to the relatives of the heres. Justinian converted the advice of Gaius into a rule of law, and disabled the heir and persons

united to him by the bond of potestas from giving attestation, Inst. 2, 10, 10. Legatees retained their competency to attest.

§ 106. This statement of Gaius respecting a will of castrense peculium, is inadvertently transferred to Justinian's Institutes, but is inconsistent with a dictum of Ulpian's in the Digest: Per contrarium quaeri potest, an pater ejus qui de castrensi peculio potest testari, adhiberi ab eo ad testamentum testis possit? Et Marcellus libro decimo Digestorum scribit posse: et frater ergo poterit, D. 28, 1, 20, 2. We have here, then, a case of Antinomy (contradictory laws) in Justinian's legislation.

By English law, 1 Vict. c. 26, any devise or legacy to an attesting witness is void, and the evidence of the witness admissible, and no person is incompetent to attest on account of being appointed executor.

In another form of will deriving its validity from the authority of the praetor, the form of mancipation was dropped, and the only authentication required was the apposition of the seals of seven attesting witnesses. Under such a will, however, the devisee could not take the legal estate or hereditas, but only the equitable estate or bonorum possessio.

Before the time of Justinian, a form of will had been established deriving its validity from three orders of legislation (jus tripertitum), the civil law, the praetorian edict, and the imperial constitutions. In accordance with the last, the witnesses were required to sign or subscribe their names; in accordance with the praetorian edict they were required to attach their seals (signacula); and in accordance with the civil law, their number was required to be seven (a number obtained by adding the libripens and familiae emptor to the five witnesses of the mancipation), and the whole formality of attestation and publication was required to be continuous, that is, to proceed from beginning to end without interruption or interposition of any other business.

Another form of will is mentioned by Justinian as perfectly valid at civil law, the Nuncupative will, consisting solely of an oral declaration in the presence of seven witnesses, Inst. 2, 10, 14. A modification of this produced one of the most solemn forms of testament. The nuncupation was made before the Praeses provinciae, or magistrates of the municipal senate (curia); and thereupon a memorandum or protocol (insinuatio) of the testator's dispositions was made at length in the public records (acta or gesta) of the

proceedings of the governor or senate. This was called a public testament. Savigny, Vermischte schriften, 27.

By English law, 1 Vict. c. 26, only two witnesses are required to a will, whether of real or personal estate. The will must be in writing, signed at the end by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged by the testator in the presence of the two witnesses, who must be present at the same time, and who must attest and subscribe the will in the presence of the testator.

DE TESTAMENTIS MILITUM.

§ 109. Se*d* haec diligens observatio in ordinandis testamentis militibus propter nimiam inperitiam *const*itutionibus Principum remissa est. nam quamvis neque legitimum numerum testium a*d*hibuerint, neque vendiderint familiam, neque nuncupaverint testamentum, recte nihilominus testantur.

§ 110. Praeterea permissum est iis et peregrinos et Latinos instituere heredes vel iis legare: cum alioquin peregrini quidem ratione civili prohibeantur capere hereditatem legataque, Latini vero per legem Iuniam.

§ 111. Caelibes quoque qui lege Iulia hereditatem legataque capere vetantur, item orbi, id est qui liberos non habent, quos lex *Papia plus quam semissem capere* prohibet (23 *lin.*).

§ 109. But from these strict rules in the execution of a will soldiers, in consideration of their extreme ignorance of law, have by imperial constitutions a dispensation. For neither the legal number of witnesses, nor the ceremony of mancipation or of nuncupation, is necessary to give force to their will.

§ 110. Moreover, they may make aliens and Latini Juniani their heirs or legatees, whereas under other wills an alien is disqualified from taking a succession or legacy by the civil law, and Latini Juniani by the lex Junia.

§ 111. Celibates also, whom the lex Julia disqualifies for taking successions or legacies, and childless persons whom the lex Papia prohibits from taking more than half a succession or legacy (see § 286, are exempt from these incapacities under the will of a soldier.)

§ 109. The military will, which superseded the old testament in procinctu, could only be executed during actual service, and in this period only when the soldier was in camp, not when he was at home or on leave of absence. A will made after the soldier's discharge from service or during his absence from camp was governed by the same rules as the will of a civilian (paganus). A military will, executed without the ordinary formalities, only remained valid during a year after discharge from service. Inst. 2, 11, 3.

TESTAMENTIFACTIO.

§ 112. S*ed senatus divo Hadriano auctore, ut supra quoque significavimus, mulieribus etiam coemptione non facta* testamentum facer*e permisit, si modo maiores facerent* annorum XII tutore auctore; scilicet ut quae tutela liberatae non essent ita testari deb*ere*nt.

§ 113. Videntur ergo melioris condicionis esse feminae quam masculi: nam masculus minor annorum XIIII testamentum facere non potest, etiamsi tutore auctore testamentum facere velit; femina vero post XII ann*um* testamenti faciundi ius nanci*s*citur.

§ 114. Igitur si quaeramus an valeat testamentum, inprimis advertere debemus an is qui id fecerit habuerit testamenti factionem: deinde si habuerit, requiremus an secundum iuris civilis regulam *testa*tus sit; exceptis militibus, qui*bus* propter nimiam *inpe*ritiam, ut diximus, quomodo velint vel quomo*do* *poss*int, permittitur testamentum facere.

§ 112. But the senate, on Hadrian's proposition, as already mentioned (1 § 115*a*), made coemption, remancipation, manumission, unnecessary, and permitted women to make a will on attaining 12 years of age, only requiring their guardian's authority if they were still in a state of pupilage.

§ 113. Women, then, are in a better legal position than males, for a male under 14 years of age cannot make a will, even with his guardian's sanction, but a female acquires the capacity of devising as soon as she is 12 years old.

§ 114. Accordingly, to determine the validity of a will, we must first ascertain whether the testator had testamentary capacity; next, if he had, whether he conformed to the requisitions of the civil law in its execution, with this reservation, that soldiers, on account of their extreme ignorance of law, as was mentioned, are allowed to make their wills in any way they like and in any way they can.

§ 112. On the lost leaf of the Veronese codex Gaius proceeded to mention the classes who were incompetent to make a will. Among these would be the filiusfamilias, who could only dispose of his peculium castrense and quasi castrense.

Testamentifactio is a term applied, (A) to the Testator, Testamentifactio activa; (B) to the object of his bounty, Testamentifactio passiva; (C) to the witnesses. Let us consider it in each of these applications.

(A) Testamentifactio activa sometimes comprehends all the conditions (physical included) of testamentary capacity, and then it excludes children and lunatics: but the proper meaning of testamentifactio is the qualification by Status for mancipatio, and consequently for the mancipatory will: that is to say, it is equivalent

to Commercium, and therefore is ascribed to all cives, all Latini, and all aliens who have received a grant of commercium.

To make a will, however, a testator must have not only personal capacity, but he must also have property to leave. This latter condition is necessarily wanting to the Filiusfamilias and to the Latinus Junianus: in their case, therefore, Testamentifactio does not mean capacity of being testator, but of playing some other part in the mancipatory will; i.e. of being devisee, or legatee, or witness.

The testator's capacity is required at two periods: at the time of making the will and at the time of the testator's death. The strict civil law also required the continuance of capacity during the interval between these dates: but the praetor disregarded any intervening incapacity (capitis diminutio), and, notwithstanding such an event, gave the will efficacy by granting to the devisee, not the civil hereditas which was beyond his power but, juxta-tabular possession (bonorum possessio juxta or secundum tabulas) 2 § 147, Ulpian 23, 6. Exigit praetor ut is cujus bonorum possessio datur utroque tempore jus testamenti faciendi habuerit, et quum facit testamentum et quum moritur . . . . Sed si quis utroque tempore testamentifactionem habuerit, medio tempore non habuerit, bonorum possessio secundum tabulas peti poterit, D. 37, 11, 1. 8.

Two other cases of incapacitation were cured by the principle of postliminy and the lex Cornelia testamentaria: if a testator suffered capitis diminutio maxima by falling into the hands of the enemy, if he returned from captivity his will reacquired validity by the operation of postliminy: if he never returned his will obtained validity by the fiction that he died a moment before his capture. Quatenus tamen diximus ab hostibus capti testamentum irritum fieri, adjiciendum est postliminio reversi vires suas recipere jure postliminii, aut si ibi decedat lege Cornelia confirmari, D. 28, 3, 6, 12. In omnibus partibus juris is qui reversus non est ab hostibus, quasi tunc decessisse videtur cum captus est, D. 49, 15, 18. Ulpian, 23, 5.

The physical conditions of testamentary incapacity (infancy, lunacy) are only critical at the date of making the will.

The praeterition of suus heres, another circumstance which as well as testamentifactio affected the validity of a will, was at civil law critical both at the time of making the will and at the time of the testator's death and in the interval: but in later times this defect of a will was healed by the praetor who granted juxta-tabular possession if the defect only existed at the first and third period,

D. 28, 3, 12, so that practically the existence of a pretermitted suus heres at the time of the testator's death was alone important.

(B) The Honoratus or the recipient of the testator's bounty, whether heres or legatarius, required testamentifactio passiva, which like testamentifactio activa meant Commercium or capacity of taking part in mancipatio. Accordingly both a filiusfamilias and a Latinus could be heres or legatee (for the limitation, however, of the capacity of Latinus Junianus by the lex Junia Norbana see below). This capacity must exist at three periods (tria tempora): the making of the will, the death of the testator, and the acquisition of the succession by the heres (aditio). The interval between the making of the will and the death of the testator was immaterial, Inst. 2, 19, 4, D. 28, 5, 59, 4. The interval between the death of the testator and the aditio of the heres was material, because on the incapacitation of the first heres institutus the inheritance would be instantaneously delated (offered for acceptance) to the heres substitutus or to the successor ab intestato.

The looking to the capacity of Honoratus at the date of making the will as well as later, though apparently based on no motives of testamentary policy, but only due to the mancipatory form of the primitive will, which was ostensibly a mancipatio inter vivos, i. e. a disposition taking effect in the lifetime of the mancipator, was retained in Justinian's legislation after wills had lost their mancipatory form.

In respect of Honoratus it is necessary to distinguish institutio from acquisitio (aditio); and testamentifactio passiva, competence for institution, from capacitas or jus capiundi, competence for acquisition. Testamentifactio passiva was required at the date of the making of the will; and in its absence a disposition was deemed to be unwritten (pro non scripto habetur); and the property disposed of went by Accretio to the other heredes scripti. Capacitas, in its distinctive sense, was only required at the date of acquisition; and in its absence the unacquired property became caducous, and devolved in part or in whole to certain persons or to the state, as determined by the laws of caducity.

Incapaces, or persons who from want of capacitas forfeited part or the whole of the testator's bounty, comprehended:

(1) Latini Juniani, who were made incapable by the lex Junia Norbana, 1 § 23, 2 § 110, 2 § 275. But see Ulpian, 17, 1.

(2) The unmarried (coelebs), married but childless (orbus),

widower or divorced with children (? pater solitarius), who were made partially incapable by the lex Papia Poppaea:

(3) Husband or wife (vir et uxor), who by the same law could only take one tenth of a heritage, and another tenth for every living child by a former marriage: further, another tenth for a common child that lived to the day of naming (nominum dies), or two tenths for two such children, but not more. In addition to their tenth, the husband or wife might have the usufruct, and, if not childless, the property in a third, Ulpian, 15:

(4) Probrosae feminae, i. e. prostitutes and actresses. Suetonius, Domitian, 8:

(5) Indigni, or persons who on various grounds were deemed unworthy of the testator's bounty. In this case the devolution of the property was not governed by the same rules as in other cases of caducity. See § 151.

Only the two last classes were recognized in Justinian's legislation: so that at that period the distinction between capacitas and testamentifactio passiva had lost much of its importance. Vangerow, § 429.

(C) Testamentifactio was further applied to designate the qualification of the witnesses to a will. This was only required to exist at one period, the date of the execution of the will. Savigny, § 393.

§ 113. By English law, the age at which a person was competent to make a will was formerly the same as by Roman law, namely, 12 years for females, 14 years for males; but now, by 1 Vict. c. 26, no one is competent to make a will before attaining 21 years of age.

BONORUM POSSESSIO SECUNDUM TABULAS.

§ 115. Non tamen, ut iure civili *valeat* testamentum, sufficit ea observatio quam supra expo*sui*mus de familiae venditione et de testibus et de nuncupationibus.

§ 116. Ante omnia requirendum est an institutio heredis sollemni more facta sit: nam aliter facta institutione nihil proficit familiam testatoris ita venire, testes*ve* ita *ad*hibere, aut nuncupare testamentum, ut supra diximus.

§ 115. The civil law, however, is not satisfied by observing the requisitions hereinbefore explained respecting mancipation, attestation, and nuncupation.

§ 116. Above all things, we must observe whether the institution of an heir was in the sacramental terms; for if the institution of an heir was not in the traditional form, it is unavailing that the mancipation, attestation, nuncupation, were regular.

§ 117. Sollemnis autem institutio haec est: TITIUS HERES ESTO. sed et illa iam conprobata videtur: TITIUM HEREDEM ESSE IUBEO. at illa non est conprobata: TITIUM HEREDEM ESSE VOLO. set et illae a plerisque inprobatae sunt: HEREDEM INSTITUO item HEREDEM FACIO.

§ 117. The solemn form of institution is this: 'Be Titius my successor.' The following also seems now to be recognized: 'I order that Titius be my successor' 'I wish Titius to be my successor' is not admitted; and most reject the following: 'I institute Titius my successor,' 'I make Titius my successor.'

§ 118. Observandum praeterea est, ut si mulier quae in tutela sit faciat testamentum, tutoris *auctoritate* facere debeat: alioquin inutiliter iure *civili* testabitur.

§ 118. It is also to be remembered that a woman who has a guardian must have her guardian's authority to devise, or her will is invalid at civil law.

§ 119. Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti *bonorum possessionem* pollicetur: *et* si nemo sit ad quem ab intestato iure legitimo pertineat hereditas, velut frater eodem patre natus aut patruus aut fratris filius, ita pot*e*runt scripti heredes retinere hereditatem. nam idem iuris est et si alia ex *causa* testamentum non valeat, velut quod familia non venierit aut nuncupationis verba testator locutus non sit.

§ 119. The praetor, however, if the will is attested by the seals of seven witnesses, promises to put the devisees in juxta-tabular possession, and if there is no one to take the legal inheritance by descent, a brother by the same father, for instance, a father's brother, or a brother's son, the devisees are secure from eviction; for the same rule obtains if the will is invalid from any other cause, such as the absence of mancipation or nuncupation.

§ 120. Sed videamus an *non*, etiamsi frater aut patruus extent, potiores scriptis heredibus habeantur. rescri*p*to enim Imperatoris Antonini significatur, eos qui secundum tabulas testamenti non iure factas bonorum possessionem petierint, posse adversus eos qui ab intestato vindicant hereditatem defendere se per exceptionem doli mali.

§ 120. But are not even a brother and paternal uncle postponed to the devisees? for the rescript of the emperor Marcus Aurelius Antoninus (or A. Pius) permits the devisee who has obtained juxta-tabular possession under an informal will to repel the claimants in intestacy by the plea of fraud.

§ 121. Quod sane quidem ad masculorum testamenta pertinere certum est; item ad feminarum quae ideo *n*on utiliter testat*ae* sunt, quod verbi gratia familiam non vendiderint aut nuncupationis verba locutae non sint: an autem et ad ea testamenta feminarum quae sine tutoris auctoritate fecerint haec constitutio pertineat, videbimus.

§ 121. This applies to the wills of males and females which are informal for such faults as want of mancipation or nuncupation: whether also to wills of females who devise without their guardian's authority, is a question.

§ 122. Loquimur autem de his

§ 122. We are not speaking of

scilicet feminis quae non in legitima parentium aut patronorum tutela sunt, sed de his quae alterius generis tutores habent, qui etiam inviti coguntur auctores fieri: alioquin parentem et patronum sine auctoritate eius facto testamento non summoveri palam est.

females who are the statutory wards of their parent or patron, but of those who are wards of the other sort of guardian, whose guardians are compellable to lend their authorization; for a parent or patron can certainly not be disinherited by an unauthorized will.

§ 117. The necessity of using formal words in the institution of an heir was abolished by a constitution of Constantine, Constantius, and Constans, A.D. 339, Cod. 6, 23, 15.

As to the nomenclature employed in the following exposition of Roman testamentary law, it must be observed that Heres corresponds sometimes to the Heir, sometimes to the Devisee, sometimes to the Executor, of English jurisprudence. In the language of English jurisprudence, Heir denotes a successor to real estate, while Executor denotes a successor to personal property. Again, Heir denotes a successor to real estate by descent, Devisee denotes a successor to real estate under a will. Accordingly, to avoid misleading an English reader by false associations, in translating the word Heres, Successor has generally been employed instead of Heir, without, however, entirely renouncing the use of the shorter word, which is often convenient from its relation to the indispensable terms disinherit and disinheritance.

Devisee has generally been employed, in preference to Executor, as a translation of scriptus heres, but it must then be stripped of any reference to the distinction between property in money and property in land. The word Executor is not available as a translation of heres. The Executor of English law, unless also a legatee, holds a merely onerous office; whereas the heres of Roman law was always a beneficiary. The Roman heres, in fact, united the characters of the English executor and residuary legatee: and the lex Falcidia provided that the residue should always amount to at least a fourth of the testator's property.

Bequest (which in English law is related to personalty as devise to realty) has been used in connection with legacies, i.e. with dispositions in favour of legatarius as opposed to heres; in favour, that is, of a person who takes a single thing belonging to the testator, not his familia, or the Universitas of his rights and obligations, or even a fraction of this Universitas.

§ 119. The praetor only sustained a testament in spite of its civil invalidity when the grounds of civil invalidity were merely want of external formalities (mancipation, nuncupation), not against more material defects, such as preterition of self-successor, § 148, D. 37, 2, 7. He sustained it, however, against the preterition of suus postumus, if suus postumus died before the testator, D. 28, 3, 12.

§ 120. The praetorian succession, or right of succession introduced by the praetor under the name of Bonorum possessio, sometimes beside, and sometimes instead of, civilis hereditas, may be divided into testate succession and intestate succession. The latter branch (bonorum possessio intestati) was firmly established at an earlier period than the former (bonorum possessio secundum tabulas). The rescript of Marcus Aurelius, mentioned by Gaius, may be regarded as having definitively established the validity of the praetorian testament; in other words, as having raised in respect of validity bonorum possessio testati to the level of bonorum possessio intestati.

In its origin Bonorum possessio was probably only the provisional or interimistic possession granted to one of the parties in a suit of Hereditatis petitio. This suit was a species of Real action (vindicatio), and in all Real actions it is necessary to determine which of the litigants shall have possession during the pendency of the litigation. In the earliest period, that of statute-process (legis actio), the interim possession was called vindiciae, and the praetor who assigned it to one of the parties was said vindicias dicere. In making the grant of vindiciae he was probably governed by the same rule which afterwards prevailed when the question of interim possession was determined by application of the Interdicts Utrubi and Uti possidetis: that is to say he probably allowed the party in actual possession to continue in possession. But this rule was inapplicable to the case of Hereditatis petitio, for at the decease of the proprietor who leaves an inheritance not one of the claimants to succeed is in actual possession. Here accordingly the grant was governed by different principles: if a will, prima facie valid, was propounded, possession was granted to the claimant under the will (bonorum possessio secundum tabulas): if no will was propounded possession was granted to the civil heirs (bonorum possessio ab intestato), the self-successor or descendant (suus heres) being preferred to the agnates or collaterals (legitimi). At a later

period, persons who were not recognized as heirs by the civil code, namely cognates, and the wife or husband, were put in possession in default of civil heirs: and children (liberi) who by emancipation had lost the character of self-successors, were nevertheless admitted to possession in the first rank just as if they had continued unemancipated. The right of provisional possession of course corresponded to a presumptive right of definitive ownership.

Although a will was propounded, yet if a descendant of the testator was therein pretermitted (praeteritus), i.e. not expressly either instituted successor or disinherited, possession was not granted to the devisees but to the pretermitted descendant (bonorum possessio contra tabulas). Contra-tabular possession was sometimes equivalent to intestacy, sometimes to partial testacy. If the praeteritus was suus heres the will was absolutely void: if the praeteritus was an emancipated son, although he obtained contra-tabular possession, he was bound, as we shall see, by some of the dispositions of the will; so that his succession was partly intestate, partly testate.

§ 122. In ancient Rome, females, even after attaining their majority, were subject to perpetual guardianship. In the time of Gaius, the only effectual guardianship to which they continued subject appears to have been that of ascendants and patrons. By the time of Justinian even this had ceased, for he mentions without any reservation that the tutelage of women ceases on their attaining the age of 12, Inst. 1, 22.

DE EXHEREDATIONE LIBERORUM.

§ 123. Item qui filium in potestate habet curare debet, ut eum vel heredem instituat vel nominatim exheredet; alioquin si eum silentio praeterierit, inutiliter testabitur: adeo quidem, ut nostri praeceptores existiment, etiamsi vivo patre filius defunctus sit, neminem heredem ex eo testamento existere posse, scilicet quia statim ab initio non constiterit institutio. sed diversae scholae auctores, siquidem fili*us* mortis patris tempore vivat, sane impedimento eum esse scriptis heredibus et illum ab intestato heredem fieri confitentur: si vero ante mortem patris interceptus sit, posse ex tes-

§ 123. Moreover, a testator who has a son in his power must take care either to institute him heir or to disinherit him, for passing him over in silence vacates the will. So much so, that according to the Sabinians, even if the son die in the lifetime of the father, no devisee can take under the will because of its original nullity. But, according to the Proculeians, although the son, if alive at the time of his father's death, bars the devisees and takes as self-successor by intestacy, yet, if the son die before the father, the devisees may succeed, being no longer barred by

tamento heredi*ta*tem adiri putant, nullo iam filio impedimento; quia scilicet existimant *non* statim ab initio inutiliter fieri testamentum filio praeterito.

§ 124. Ceteras vero liberorum personas si praeterierit testator, valet testamentum. praeteritae istae personae scriptis heredibus in partem ad*crescunt: si sui instituti sint* in virilem; si extranei, in dimidiam. id est si quis tres verbi gratia filios heredes instituerit et filiam praeterierit, filia adcrescendo pro quarta parte fit heres; p*lacuit enim eam tuendam esse pro ea parte, quia etiam ab intestato eam partem* habitura esset. at si extraneos ille heredes instituerit et filiam praeterierit, filia adcrescendo ex dimidia parte fit heres. Quae de filia diximus, eadem *et* de n*e*pot*e* d*e*qu*e* omnibus liberorum personis, si*ve* masculini *sive* feminini sexus, dicta intellegemus.

§ 125. Quid ergo est? licet *feminae* secundum *ea quae* diximus scriptis heredibus dimidiam partem ta*ntum* detrahant, tamen Praetor eis contra tabulas bonorum possessionem promittit, qua ratione extranei heredes a tota hereditate repelluntur: et efficeretur sane *per hanc* bonorum possessio*nem*, *ut* nihil inter f*e*min*as* et masculos interesset.

§ 126. Se*d* nuper Imperator Antoninus significavit rescri*p*to su*as* non plus nanci*s*ci feminas per bonorum possessionem, quam quod iure adcrescendi consequerentur. quod in emancipatis f*eminis similiter obtinet, scilicet ut quod* adcrescendi iure habitur*ae* essent, *si* s*uae* fuissent, id ipsum etiam per bonorum possessionem habeant.

§ 127. Sed si qui*dem* filius a patre exheredetur, nominatim ex*here*dari

the son, assuming that the will was not absolutely vacated by his silent pretermission.

§ 124. By the pretermission of other self-successors a will is not avoided, but the omitted persons come in to share with the devisees, taking an aliquot part if the latter are self-successors, a moiety if they are strangers. Thus if a man has three sons and makes them his successors, saying nothing of his daughter, the daughter comes in as co-successor and takes a fourth of the estate, being deemed entitled to the portion which would have devolved to her by intestacy: but when the devisees are strangers, the daughter, if passed over, comes in and takes a moiety. What has been said of the daughter applies to the son's children, male and female.

§ 125. But though a female according to this statement of the law only deprives the devisees of a moiety, the praetor promises to give her contra-tabular possession, so that the devisees, if strangers, lose the whole, and the effect of this contra-tabular possession would be to efface the distinction between males and females.

§ 126. But A. Pius (or M. Aurelius) has recently decided that female self-successors shall not take more by contra-tabular possession than they would by coming in as coheirs at civil law. And the same rule applies to emancipated daughters, namely, that the shares they would have had as coheirs had they not been emancipated shall be the measure of what they obtain by contra-tabular possession.

§ 127. A son must be disinherited individually. Individual disherison

ante . . . . potest exheredari. nominatim autem exheredari videtur sive ita exheredetur: TITIUS FILIUS MEUS EXHERES ESTO, *sive ita:* FILIUS MEUS EXHERES ESTO, non adiecto proprio nomine.

§ 128. *Masculorum ceterorum* personae vel feminini sexus *aut nominatim exheredari possunt, aut inter ceteros, velut hoc modo:* CETERI EXHEREDES SUNTO: *quae verba post institutionem* heredum adici so*lent.* sed *haec ita sunt iure civili.*

§ 129. Nam Praetor omnes virilis sexus, tam *filios quam ceteros,* id est nepotes quoque et pro*nepotes nominatim exheredari iubet, feminini vero inter ceteros: qui nisi fuerint ita exhere*dati, *promittit eis contra tabulas bonorum possessionem.*

§ 130. Postumi quoque liberi *vel heredes institui debent vel* exheredari.

§ 131. Et *in eo par omnium condicio est, quod et in filio postumo et in quolibet ex ceteris liberis, sive feminini sexus sive masculini, praeterito, valet quidem testamentum, sed postea adgnatione postumi sive postumae rumpitur, et ea ratione totum infirmatur: ideoque si mulier ex qua postumus aut postuma sperabatur abortum fecerit, nihil impedimento est scriptis heredibus ad hereditatem adeundam.*

§ 132. *Sed feminini quidem sexus postumae vel nominatim vel inter ceteros exheredari solent. dum tamen si inter ceteros exheredentur, aliquid eis legetur, ne videantur per oblivionem praeteritae esse: masculos vero postumos, id est filium et deinceps, placuit non aliter recte exheredari, nisi nominatim exheredentur, hoc scilicet modo:* QUICUMQUE MIHI FILIUS GENITUS FUERIT, EXHERES ESTO.

may be expressed in these terms: Be Titius my son disinherited: or in these: Be my son disinherited, without inserting his name.

§ 128. Other male and all female self-successors may be either individually or collectively disinherited thus: Be the remainder disinherited, which words usually follow the institution of the heir: this, however, is only the rule of the civil law.

§ 129. For the Praetor requires all male self-successors, sons, grandsons, greatgrandsons, to be disinherited individually, although he permits females to be disinherited in an aggregate, and, failing such disherison, promises them the contratabular succession.

§ 130. Children born after the making of the will must either be instituted heirs or disinherited:

§ 131. and in this respect are similarly privileged that if a son or any other self-successor, male or female, born after the making of the will, be passed over in silence, the will is originally valid, but subsequently rescinded and avoided by the birth of the child; so that if the woman from whom a child was expected have an abortive delivery, there is nothing to prevent the devisees from taking the succession.

§ 132. Female self-successors born after the making of the will may be either individually or generally disinherited, with this proviso, that if they are generally disinherited, some legacy must be left them in order that they may not seem to have been forgotten and pretermitted. Male self-successors, sons and further lineal descendants, are held not to be duly disinherited unless they are disinherited individually, thus: Be any son that shall be born to me disinherited.

§ 133. *Postumorum loco sunt et hi qui in sui heredis locum succedendo quasi adgnascendo fiunt parentibus sui heredes. ut ecce si filium et ex eo nepotem neptemve in potestate habeam, quia filius gradu praecedit, is solus iura sui heredis habet, quamvis nepos quoque et neptis ex eo in eadem potestate sint; sed si filius meus me vivo moriatur, aut qualibet ratione exeat de potestate mea, incipit nepos neptisve in eius locum succedere, et eo modo iura suorum heredum quasi adgnatione nancisci.*

§ 133. With children born after the making of the will are classed children who succeed to the place of a self-successor, and thus become self-successors to an ancestor. For instance, if a testator have a son, and by him a grandson or granddaughter under his power, the son being nearer in degree alone has the rights of self-successor, although the grandson and granddaughter are equally in the ancestor's power. But if the son die in the lifetime of the testator, or by any other means pass out of the testator's power, the grandson and granddaughter succeed to his place, and thus acquire the rights of self-successors to the testator just as if they were children born after the making of the will.

§ 134. *Ne ergo eo modo rumpat mihi testamentum, sicut ipsum filium vel heredem instituere vel exheredare nominatim debeo, ne non iure faciam testamentum, ita et nepotem neptemve ex eo necesse est mihi vel heredem instituere vel exheredare, ne forte, me vivo filio mortuo, succedendo in locum eius nepos neptisve* quasi adgnatione rumpat test*amentum: idque lege Iunia Velleia provisum est; qua simul cavetur, ut illi tanquam postumi, id est* virilis sexus nominatim, feminini vel nominatim vel inter ceteros exheredentur, dum tamen iis qui inter ceteros exheredantur *aliquid legetur.*

§ 134. To prevent this subsequent avoidance of my will, just as a son must be either instituted heir or disinherited individually to make a will originally valid, so a grandson or granddaughter by a son must be either instituted heir or disinherited, for if the son die in the testator's lifetime the grandson and granddaughter take his place and vacate the will just as if they were children born after its execution. Accordingly the lex Junia Velleia allows them to be disinherited just like children born after a will is executed, that is to say, males individually, females either individually or collectively, provided that those who are disinherited collectively receive a legacy.

§ 135. *E*mancipatos liber*os iure civili neque heredes instituere neque exheredare necesse est, quia* non sunt sui heredes. sed Praetor omnes, tam feminini quam masculini sexus, si heredes non instituantur, exheredari iubet, virilis sexus *filios et ulterioris gradus nominatim, feminini* vero inter ceteros. q*uod*si neque heredes instituti fuerint, neque *ita,* ut supra

135. Emancipated children by civil law need neither be appointed heirs nor disinherited because they are not self-successors. But the Praetor requires all, females as well as males, unless appointed heirs, to be disinherited, males separately, females collectively, and if they are neither appointed heirs nor disinherited as described, the Praetor

diximus, exheredati, Praetor promittit eis contra tabulas bonorum possessionem.

promises to give them the contra-tabular possession.

§ 135*a*. In potestate patre *constituto*, *qui* inde nati sunt, n*ec* in accipienda *bonorum possessione* pat*ri* *concurrunt qui possit* eos in potestate habere; aut si petitur, non impetra*bitur*. namqu*e* per *ipsum* patre*m* *suum* pro*hib*entur. nec differu*nt* *emancipati et sui*.

§ 135*a*. Grandchildren by an unemancipated son are excluded from any portion of the contra-tabular succession by the prior right of their father, whether they are emancipated or unemancipated [D. 37, 8, 1, 6. Whereas unemancipated grandchildren by an emancipated son take one moiety and their emancipated father takes the other moiety of the share which he would have taken by intestacy had he not been emancipated, D. 37, 8, 1, 11.]

§ 136. *Adoptivi*, quamdiu tenentur in adoptionem, naturalium loco sunt: emancipati vero *a* patre adoptivo neque iure civili, neque quod ad edictum Praetoris pertinet, *inter liberos numerantur*.

§ 136. Adoptive children, so long as they continue in the power of the adoptive father, have the rights of his natural children: but when emancipated by the adoptive father they neither at civil law nor in the Praetor's edict are regarded as his children.

§ 137. Qua ratione accidit, ut ex diverso, quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur. *cum vero emancipati* fuerint *ab adoptivo patre, tunc incipiant* in ea causa esse qua futuri essent, si ab ipso naturali patre *emancipati* fuissent.

§ 137. And conversely in respect of their natural father as long as they continue in the adoptive family they are strangers: but when emancipated by the adoptive father they have the same rights in their natural family as they would have had if emancipated by their natural father (that is, unless either instituted heirs or disinherited by him, may claim the contra-tabular succession.)

§ 123. The necessity of disinheriting a suus heres is grounded on the principle of primitive law, that the child is co-proprietor with the parent: hence, unless something occurs to divest the child of his property, he will simply become sole proprietor by survivorship on the death of his father. In suis heredibus evidentius apparet, continuationem dominii eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimabantur. Unde etiam filiusfamilias appellatur, sicut paterfamilias, sola nota hac adjecta, per quam distinguitur genitor ab eo qui genitus sit. Itaque post mortem patris non hereditatem percipere videntur, sed magis

liberam bonorum administrationem consequuntur. Hac ex causa, licet non sint heredes instituti, tamen domini sunt, nec obstat, quod licet eos exheredare, quos et occidere licebat, Dig. 38, 2, 11. 'In self-succession we have a still more striking instance of an unbroken continuity of dominion, for there appears to be no vesting of new property by descent, but the heir is deemed to have been previously proprietor even during the lifetime of the father. Hence the names filiusfamilias and paterfamilias, implying a similar legal relation to the patrimony, though one is parent and the other child. Therefore the death of the parent occasions no acquisition of new property by descent, but only an increased freedom in the administration of already existing property. Hence, even in the absence of testamentary institution, a self-successor is proprietor: and it is no objection to this, that a parent has the power of disinheriting a self-successor, for he also had the power of putting him to death.'

The characteristic of the Roman will that it grounded a Universal succession (unlike the English will which may be a merely Partial definition of the succession), which is expressed in the maxim: Nemo pro parte testatus, pro parte intestatus decedere potest, had its historic origin, not probably in a perception of its manifold utility, but in the primitive form of the will—a proposal laid before the legislative assembly for its sanction, § 101. The assembly could no more judge of the justice of a proposed arrangement without having laid before it the whole plan of succession than it could judge of the fairness of a contract by inspection of a single paragraph. It could not therefore allow the testator merely to lay before it certain partial modifications of the intestate succession and leave the rest of his inheritance to follow the general rules of intestacy, without further informing the assembly of their operation. This consideration involves the rules respecting the effect of Praeteritio. If the testator's dispositions were valid in spite of Praeteritio, he would have it in his power to commit a fraud upon the assembly by suppressing some element that was material to enable them to form a judgment. Accordingly Praeteritio was made to defeat itself, in the case of the son by nullification (inutilitas), in the case of other issue by Accretio, § 124.

After the introduction of the mancipatory will the fraud against the legislature would cease to be a motive for the rule requiring the testator to define a Universal succession; but the rule was

retained in order to force the testator to have before his mind a clear and systematic view of his intentions by requiring their simultaneous expression in a single document. It secured the afterborn from oblivion and protected the son who was falsely supposed to be dead from the consequences of the testator's error. At the latest period the use of Codicils permitted to a certain extent the partial and fragmentary disposition of a patrimony, but this was not extended to the principal point, the heredum institutio. Ihering, § 53.

§ 124. Justinian abolished this accretion and equalized the sexes, enacting that the pretermission of any suus heres or sua heres should absolutely vacate a will, and entitle to bonorum possessio contra tabulas, like the pretermission of the son, Cod. 6, 28, 4.

§ 127. Justinian abolished this distinction and required that all sui heredes should be disinherited individually like the son. Ibid.

§ 130. Afterborn children (postumi), that is, children born after the making of a will, are uncertain persons, and by the general rule that uncertain persons cannot be instituted or disinherited (incerta persona heres institui non potest, Ulpian 22, 4), ought to be incapable of institution or disinheritance, and, therefore, if they are sui heredes, would necessarily invalidate a will, because every will is informal when there exists a suus heres who is neither instituted nor disinherited. If the suus heres was born in the lifetime of the testator, the revocation of the will would not be an irremediable evil, because the testator would still have it in his power to make another will, and accordingly in this case the civil law left the general rule to operate. But if the suus heres were born after the death of the testator, the evil would be irreparable, and the testator would die intestate. To prevent this, the civil law made an exception to the rule that an uncertain person cannot be instituted or disinherited, and permitted the institution or disinheritance of any suus heres who should be born after the death of the testator: and on the authority of the celebrated jurist Aquilius Gallus, the inventor of a form of acceptilation (3 § 169), this power was extended to the institution or disinheritance of any afterborn grandchild of the testator whose father should die in the interval between the making of the will and the death of the testator. Gallus Aqui-

lius sic posse institui postumos nepotes induxit: Si filius meus vivo me morietur, tunc si quis mihi ex eo nepos sive quae neptis post mortem meam in decem mensibus proximis, quibus filius meus moreretur, natus nata erit, heredes sunto, Dig. 28, 2, 29, pr. 'Gallus Aquilius introduced the institution of afterborn grandchildren in the following manner: If my son die in my lifetime, then let any grandson or granddaughter by him who may be born after my death within ten months after the death of my son, be my successor.' Such grandchildren are called Postumi Aquiliani.

In respect of the suus heres born after the making of the will but in the lifetime of the testator, the case which the civil law left to the operation of the general rule, it might certainly be sometimes possible to make a new will after his birth, but it might sometimes be impossible or highly inconvenient, and accordingly the lex Junia Velleia passed A.D. 10, at the close of the reign of Augustus, in its first chapter permitted such children also of the testator, and also grandchildren of the testator born after their father's death in the lifetime of their grandfather, to be instituted or disinherited. Such children and grandchildren were called Postumi Velleiani primi capitis. In its second chapter it permitted the institution or disinheritance of another class of uncertain persons, viz. quasi-afterborn children (postumorum loco); grandchildren, for instance, who were born before the making of the will but whose acquisition of the character of sui heredes by the decease of their father is subsequent to the making of the will.

Such grandchildren are called Postumi Velleiani secundi capitis.

Besides the Postumi Aquiliani, the Postumi Velleiani primi capitis and the Postumi Velleiani secundi capitis, the jurist Salvius Julianus who systematized the Edict established the validity of the institution or disinheritance of a fourth class, intermediate between the Postumi Velleiani of the first and second chapter: grandchildren, namely, who like the Velleiani of the first chapter were born after the making of the grandfather's will, but who like those of the second chapter were born before the death of their father. Such grandchildren are not sui heredes to their grandfather at their birth, but only by succession, that is by the subsequent death of their father, like those of the second chapter, D. 28, 2, 29, 15.

The following is a conspectus of the different kinds of Postumi sui, i.e. descendants who after the making of a will come into the

immediate power of a testator, whether (A) children or (B) grandchildren: to remoter descendents analogous principles will apply.

(A) Children are either

(*a*) Veritably afterborn, that is to say born after their father has made his will, whether after their father's decease, in which case the civil law treated them as certae personae, or in their father's lifetime, in which case they form a subdivision of Velleiani primi capitis:

(*b*) Or quasi-afterborn (loco postumorum), i. e. quasi-sons or quasi-daughters by adrogatio, adoptio, legitimatio, in manum conventio.

(*c*) Another quasi-afterborn is the child who falls under the immediate power of his soldier father, that is, becomes his suus heres, in consequence of the death of his grandfather, in whose power he previously was, after his father has made a soldier's will. D. 28, 2, 28, 1.

(B) Afterborn grandchildren who, as self-successors to their grandfather, require institution or disinheritance in his will fall into four classes, differentiated by the order of priority in which certain events occur, as hereunder indicated:

POSTUMI AQUILIANI,

Will of grandfather: Death of father: Death of grandfather: Birth of grandchild.

POSTUMI VELLEIANI PRIMI CAPITIS,

Will of grandfather: Death of father: Birth of grandchild: Death of grandfather.

POSTUMI SALVIANI,

Will of grandfather: Birth of grandchild: Death of father: Death of grandfather.

POSTUMI VELLEIANI SECUNDI CAPITIS,

Birth of grandchild: Will of grandfather: Death of father: Death of grandfather.

The two last cases depend on the principle of successio. The grandchild is at birth in the power of his grandfather, but is not his suus heres, so long as there is an intervening ascendant—the father—in the same power. On the death of the intervening ascendant the grandchild is said to succeed to his place, and becomes by such succession suus heres to his grandfather. Vangerow, § 468.

The afterborn stranger, though incapable at civil law of being appointed heir (§ 242), was relieved by the praetor who gave him

the juxta-tabular possession. Justinian allowed him to take the legal estate, Inst. 3, 9, pr.

§ 132. To the necessity of leaving some legacy to the disinherited afterborn sua heres (and not, as Blackstone suggests, to the querela inofficiosi) we must attribute the vulgar error in England of the necessity of leaving the heir one shilling in order to cut him off effectually. The querela inofficiosi was not barred by any legacy, however slight, being left to the heir, but only by giving him one fourth of his intestate portion. See 2 § 151. It seems that even a legacy left to an afterborn sua heres might be unavailing to save the will from avoidance, unless it amounted to one fourth of her share by descent. If no legacy at all were left, the will would be informal from want of proper disinheritance of the sua heres, and absolutely void; if less than a fourth of her share were left, the will would not be absolutely void but voidable, i. e. liable to be overthrown if the aggrieved party chose to impeach it as inofficiosum.

§ 135 *a*. The Praeteritio of a descendant who is suus heres to the testator or, but for emancipation, would be suus heres, entitles the descendant to contra-tabular possession. If the praeteritus is suus heres, the will is absolutely void and contra-tabular possession is an intestate succession: but if the praeteritus is emancipatus, the effect of contra-tabular possession is to divide the inheritance between the praeteritus and other descendants who were instituted successors, excluding both instituted strangers and disinherited descendants.

Contra-tabular possession might be claimed either by the praeteritus himself, or by any of the instituted descendants. For if an instituted heir took less by his institution than he would by this partial intestacy, it would be his interest to claim contra-tabular possession, commisso per alium edicto, 'the edict having been made applicable by another,' i. e. by the pretermission of another descendant.

The portions of the will that remained in force were:

(1) The exheredations: for such of the liberi as were duly disinherited continued, as was mentioned, excluded from the inheritance:

(2) The pupillary substitutions, the nature of which will hereafter, § 179, be explained:

(3) Legacies given to certain conjunctae personae, e. g. legacies

to ascendants or descendants of the testator, or a bequest to the wife of the dower which she had brought to her husband. If, instead of making the conjuncta persona a legatee, the testator had given his bounty in the form of a portion of the succession in which the conjuncta persona was instituted successor, such institution continued valid. The validity, however, of such legacies and institutions was by a constitution of Antoninus Pius, D. 37, 5, 7, (possibly the same as the rescript mentioned by Gaius § 120, § 126 *b*) subjected to this limitation, that all the conjunctae personae together could not take more than a virilis portio, i.e. as much as fell to the lot of the contra-tabulant or claimant of contra-tabular possession; with this further proviso, that any conjuncta persona who is instituted heir in a portion of the heritage may retain as much thereof as he would have obtained by claiming contra-tabular possession.

The partial intestacy produced by contra-tabular possession shows that the rule which we have already quoted: nemo pro parte testatus pro parte intestatus decedere potest: must be taken with some reservation. Although a testator cannot voluntarily dispose of only part of his heritage, such partial disposition may be introduced against the testator's intention by the operation of law. The significance of the rule is principally this: that if a testator only names a successor for a certain fraction of the heritage: or if the fraction devised to one of several successors lapses by his decease before the testator's death, the undevised or lapsed portion does not devolve, as it would in English law, to the heirs-at-law or persons entitled by intestacy, but goes by accrual (accretio) to the devisee or devisees of the remainder of the heritage.

In § 135 *a* Gaius explained the effect of nova clausula Juliani, D. 37, 8, which attempted to reconcile the civil claims of unemancipated grandchildren, who at civil law were the immediate successors of their grandfather, with the natural claims of their emancipated father, who by emancipation had lost his civil rights in the heritage of the testator. By the clause which Salvius Julianus introduced into the Edict, if a son is emancipated and grandchildren by him continue in the power of a testator, the grandchildren are entitled in contra-tabular possession to one moiety of what their father would have taken by descent had he continued unemancipated, and their father to the other moiety. This however is only the rule when the son is emancipated and the grandchildren

unemancipated. If the grandchildren are also emancipated, or if the grandchildren are emancipated and their father unemancipated, or if neither the son nor the grandchildren are emancipated, then the prior right of their father excludes the grandchildren from all share in the contra-tabular possession.

QUIBUS MODIS TESTAMENTA INFIRMENTUR.

§ 138. Si quis post factum testamentum adoptaverit sibi filium, aut per populum eum qui sui iuris est, aut per Praetorem eum qui in potestate parentis fuerit, omnimodo testamentum eius rumpitur quasi agnatione sui heredis.

§ 138. If after making his will a man adopts as son either a paterfamilias by a lex curiata or a filiusfamilias by mancipation and fictitious vindication, his will is inevitably vacated as it would be by the subsequent birth of a self-successor.

§ 139. Idem iuris est si cui post factum testamentum uxor in manum conveniat, vel quae in manu fuit nubat: nam eo modo filiae loco esse incipit et quasi sua *est*.

§ 139. The same happens if after making his will the testator receives a wife into his hand, or marries a person who is in his hand, as she thereby acquires the rights of a daughter and becomes his self-successor.

§ 140. Nec prodest *si*ve haec, *si*ve ille qui adoptatus est, in eo testamento sit instit*ut*us institutave. nam de exheredatione eius supervac*uu*m videtur quaerere, cum testamenti faciundi *te*mpore suorum heredum numero non fueri*t*.

§ 140. And it is unavailing that such a wife or adopted son was in that will appointed heir, for not having been self-successors when the will was made they clearly cannot have been therein disinherited.

§ 141. Filius quoque qui ex prima secundave mancipatione manumittitur, quia revertitur in potestatem patriam, rumpit ante factum testamentum. nec prodest si in eo testamento heres institutus vel exheredatus fuerit.

§ 141. So a son manumitted after the first or second sale reverts into the power of his father and vacates a previous will, nor does it avail that he is therein appointed heir or disinherited.

§ 142. Simile ius olim fuit in eius persona cuius nomine ex senatusconsulto erroris causa pro*b*atur, quia forte ex peregrina vel Latina, quae per errorem quasi civis Romana uxor ducta esset, natus esset. nam sive heres institutus esset a parente sive exheredatus, sive vivo patre causa probata sive post mortem eius, omnimodo quasi adgnatione rumpebat testamentum.

§ 142. The same rule formerly held of the son in whose behalf the decree of the senate allows proof of error, if he was born of an alien or Latin mother who was married in the mistaken belief that she was a Roman [see 1 § 67]: for whether he was appointed heir by his father or disinherited, and whether the error was proved in his father's life or after his death, in every case the will was avoided as by the subsequent birth of a self-successor.

§ 143. Nunc vero ex novo senatusconsulto quod auctore divo Hadriano factum est, si quidem vivo patre causa probatur, aeque ut olim omnimodo rumpit testamentum: si vero post mortem patris, p*rae*teritus quidem rumpit testamentum, si vero heres in eo scriptus est vel exheredatus, non rumpit testamentum; ne scilicet diligent*er* facta testamenta rescinderentur *eo tem*pore *quo* renovari non possent.

§ 143. Now, however, by a recent decree of the senate, made on the proposition of the late emperor Hadrian, if the father is alive when the error is proved, the old rule obtains and the will is in every case avoided; but when the error is proved after the father's death, if the son was passed over in silence, the will is vacated; but if he was appointed heir or disinherited the will is valid; so that carefully executed wills shall not be rescinded at a period when re-execution is impossible.

§ 144. Posteriore quoque testamento quod iure factu*m fuerit* superius rumpitur. nec interest an extiterit aliquis ex eo heres, an non extiterit: hoc enim solum spectatur, an existere potuerit. ideoque si quis ex posteriore testamento quod iure factum est, aut noluerit heres esse, aut vivo testatore, aut post mortem eius antequam hereditatem adiret decesserit, aut per *cre*tionem exclusus fuerit, aut condicione sub qua heres institutus est defectus sit, aut propter caelibatum ex lege Iulia summotus fuerit ab hereditate: quibus casibus paterfamilias intestatus moritur: nam et prius testamentum non valet, ruptum a posteriore, et posterius aeque nullas vires habet, cum ex eo nemo heres extiterit.

§ 144. A subsequent will duly executed is a revocation of a prior will, and it makes no difference whether a successor ever actually takes under it or no; the only question is, whether one might. Accordingly, whether the successor instituted in a subsequent will duly executed declines to be successor, or dies in the lifetime of the testator, or after his death before accepting the succession, or is excluded by expiration of the time allowed for deliberation, or by failure of the condition under which he was instituted, or by celibacy as the lex Julia provides; in all these cases the testator dies intestate, for the earlier will is revoked by the later one, and the later one is inoperative, as it creates no actual successor.

§ 145. Alio quoque modo testamenta iure facta infirmantur, velut *cum* is qui fecerit testamentum capite diminutus sit. quod quibus modis accidat, primo commentario relatum est.

§ 145. There is another event whereby a will duly executed may be invalidated, namely, the testator's undergoing a loss of status: how this may happen was explained in the preceding book.

§ 146. Hoc autem casu *in*rita fieri testamenta dicemus, cum alioquin et quae rumpuntur inrita fiant; *et quae statim ab initio non iure fiunt inrita sunt; sed et ea quae iure facta sunt et postea propter capitis diminutionem inrita fiunt,* possunt nihilominus rupta dici. sed

§ 146. In this case the will may be said to be null; for although both those that are rescinded and those that are not duly executed may be said to be null, and those that are duly executed but subsequently annulled by loss of status may be said to be vacated, yet as it

quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quaedam non iure fieri dicuntur, quaedam iure facta rumpi, vel inrita fieri.

is convenient that different grounds of invalidity should have different names to distinguish them, we will say that some wills are unduly executed, others duly executed but subsequently vacated or subsequently annulled.

§ 138. The innovations of Justinian changed the effects of adoption. Under his enactment, if a child is adopted by an ascendant the old rules obtain; but a person adopted by a stranger only acquires rights in the adoptive family in case of the adopter's intestacy, and therefore need not be instituted or disinherited by the adopter; he retains, however, his rights in his natural family, and therefore must be instituted or disinherited in the will of his natural parent.

§ 139. By English law the only circumstance by which a will is avoided (besides revocation, cancellation, execution of a later will), is the marriage of the testator, and this operates universally, irrespectively of the birth of children.

§ 140. This was reversed before the time of Justinian, for we find in D. 2, 38, 18, that the institution of the future adoptive son saves a will from being ruptured by adoption. Indeed, considering that the object of the lex Velleia was to save wills from rupture, we may be surprised that the extension of its provisions from the natural postumi to the artificial postumi or quasi postumi had not been established in the days of Gaius.

BONORUM POSSESSIO SECUNDUM TABULAS.

§ 147. Non tamen per omnia inutilia sunt ea testamenta, quae vel ab initio non iure facta sunt, vel iure facta postea inrita facta *aut* rupta sunt. nam si septem testium signis signata sint testamenta, potest scriptus heres secundum tabulas bonorum possessionem petere, si modo defunctus testator et civis Romanus et suae potestatis mortis tempore fuerit: nam si ideo inritum fit testamentum, quod postea civitatem vel etiam libertatem testator amisit, *a*ut is in adoptionem se dedit *et* mortis tempore in adoptivi patris

§ 147. Wills are not altogether inoperative either when originally informal or when at first valid and subsequently vacated or annulled; for if the seals of seven witnesses are attached, the testamentary heir is entitled to demand juxta-tabular possession, or possession in accordance with the will, if the testator was a citizen of Rome and in his own power at the time of his death; but if the cause of nullity was the testator's subsequent loss of citizenship, or loss of liberty, or adoption and he dies [an alien or slave or] subject to his

potestate fuit, non potest scriptus heres secundum tabulas bonorum possessionem petere.

§ 148. *Qui autem* secundum tabulas testamenti, quae aut statim ab initio non iure factae sint, aut iure factae postea *r*uptae vel inritae erunt, bonorum possessionem accipiunt, si modo possunt hereditatem optinere, habebunt bonorum possessionem cum re: si vero ab *i*is avocari hereditas potest, habebunt bonorum possessionem sine re.

§ 149. Nam si quis heres iure civili institutus sit vel ex primo vel ex posteriore testamento, vel ab intestato iure legitimo heres *s*it, is potest ab *i*is hereditatem a*v*ocare. si vero nemo sit alius iure civili heres, ipsi retinere hereditatem possunt, *si possident, aut* inter*dic*tum adversus eos habent q*ui bona possident eorum bonorum adipiscendae possessionis causa. interdum tamen, quanquam testamento* iure civili *institutus, vel* legitimus quoque *heres sit, potiores* scri*pti* habentur, velut *si testamentum* ideo n*on iure* factum sit au*t* quod familia non venierit, aut nuncupationis verba testator locutus non sit.

§ 150. *Alia causa est eorum, qui herede non extante bona possiderint, nec tamen a Praetore bonorum possessionem acceperint: etiam hi* possessores *tamen* res olim *obtinebant ante legem Iuliam,* qua lege bona caduca fiunt et ad populum deferri iubentur, si defuncto nemo *successor extiterit.*

§ 151. Potest ut iure facta testamenta contraria voluntate infirmentur. Apparet *autem* non posse ex eo solo infirmari testamentum, quod postea testator id noluerit valere, usque adeo ut si linum eius inciderit, nihilo minus iure civili valeat. Quinetiam si deleverit quoque aut obleverit tabulas testamenti, nihilo minus *non* desinent valere quae

adoptive father's power, the devisee is barred from demanding the juxta-tabular possession.

§ 148. Juxta-tabular possession according to a will either originally irregular or originally regular and subsequently vacated or annulled, if tenable without molestation, is effective; if defeasible by an adverse claimant, is ineffective [see 3 § 36].

§ 149. For a successor duly appointed by an earlier or later will, or a statutory successor by intestacy, can evict the juxta-tabular possessor from the inheritance [see, however, § 120]; though in default of such claim the juxta-tabular successor can retain possession, if he already has it, and if he has it not, can obtain it by the interdict Quorum bonorum. Sometimes, however, a duly instituted or statutory successor is postponed to an irregularly appointed successor; for instance, if the irregularity was only the absence of mancipation or nuncupatory publication.

§ 150. Those who, failing all successors ab intestato, took possession of a heritage without any title of their own, were formerly unmolested: but by the lex Julia caducaria the succession to such a vacant heritage devolves by caducity to the state.

§ 151. A validly executed will may be invalidated by revocation: but a will is not invalidated by the mere intention of revocation. And consequently, in spite of the testator's cutting the strings by which it is tied, it nevertheless, at civil law, continues valid: and his erasure or obliteration of the dispositions does not render them invalid, though it

fuerant scripta, licet eorum probatio difficilis sit. Quid ergo est? si quis ab intestato bonorum possessionem petierit et is, qui ex eo testamento heres est, petat hereditatem suam esse, vincat quidem necesse est in hereditatis petitione; sed fiscus ei quasi indigno auferet hereditatem, ne ullo modo ad eum, in quem testator heredem habere noluit, perveniat hereditas; et hoc ita rescripto imperatoris Antonini significatur.

makes them difficult of proof. What then is the result? If a claimant demand bonorum possessio by intestacy, and a devisee demand the civil inheritance under the will, the devisee must prevail in his suit, but the treasury treats him as unworthy and deprives him of the succession, in order to carry the testator's intention of excluding him into effect: and this was enacted by a rescript of Marcus Aurelius Antoninus.

§ 147. The validity of a testament implies, strictly speaking, the continuance of the testator's intention, and therefore of his capacity of intention (testamentifactio), from its first declaration to the moment of his death. Accordingly an intermediate capitis diminutio made the will invalid (irritum) at civil law. The praetor, however, only looked at the first and last moments, and, if at these periods the testator had testamentifactio, sustained his intentions by granting juxta-tabular possession.

So at civil law a will was broken (ruptum) by after-birth (agnatio) of a self successor, § 138; but if he died before the testator, the praetor sustained the will by granting juxta-tabular succession to the heres scriptus. Postumus praeteritus, vivo testatore natus, decessit. Licet juris scrupulositate nimiaque subtilitate testamentum ruptum videatur, attamen si signatum fuerit testamentum, bonorum possessionem secundum tabulas accipere heres scriptus poterit, remque obtinebit, ut et divus Hadrianus et Imperator noster rescripserunt, D. 28, 3, 12, pr. In order that juxta-tabular succession, granted when a will had been avoided (irritum) by intervening loss of capacity, might be efficacious (cum re), i.e. not defeasible by the claimant entitled at civil law by intestacy, it was necessary that the testator on reacquiring capacity should confirm his will by a codicil, D. 37, 11, 11, 2.

§ 148. There was no ipso jure, or necessarius, bonorum possessor, corresponding to the heres necessarius, § 152, with whom delatio and acquisitio hereditatis were coincident: all bonorum possessores corresponded to the other class of heres, the heres extraneus or voluntarius, with whom acquisitio was distinct from delatio hereditatis, and required a voluntary act (aditio). That is to say, the person called (vocatus) by the praetorian edict to the succession forfeited his right to succeed unless he made his claim (agnitio,

petitio, admissio, bonorum possessionis), within a certain period, usually 100 dies utiles from the date of the vocatio (delatio). On the claim being made, the grant (datio) of bonorum possessio followed as a matter of course without any judicial investigation (causae cognitio). It was a mere formality, a certificate of the magistrate, the praetor or praeses provinciae, that the agnitio had been made within the allotted period, before the expiration of the term allowed for deliberation. If any real controversy arose, it was decided by one of two actions, hereditatis petitio, or the Interdict Quorum bonorum. If the claimant relied on his title at civil law, he sued by hereditatis petitio; if he relied on the title given him by the praetorian edict, he sued by the Interdict Quorum bonorum. If defeated in either of these proceedings, he gained nothing by having obtained the formal grant of praetorian succession—he had only bonorum possessio sine re. See 4 § 144.

§ 150. Originally when a heritage was vacant from the failure of intestate successors, Ulpian 28, 7, or from the neglect of a devisee to take possession, § 52, any stranger might take possession and acquire by usucapio. In the case of testacy this right was abolished by Sc. Juventianum: and by lex Julia caducaria in default of all other intestate successors a heritage devolved to the state (fiscus). The state did not become necessary successor (ipso jure) but had the delatio (ad populum deferri jubentur), i.e. had the right of deliberation and acceptance or repudiation, Inst. 3, 11, 1. As universal successor the state could by the terms of Sc. Juventianum recover from the unentitled occupant by Hereditatis petitio, D. 5, 3, 20, 7, and could transfer its rights to a purchaser by Sc. Trebellianum, ibid 54, pr.

The Fiscus was bound to pay all codicillary legacies and trusts: and succeeded to all the obligations active and passive, in other words, to all the personal rights and personal duties, of the heritage-leaver: but like other successors might, by taking advantage of the Benefice of inventory, confine its liability to the extent of the assets. In the event of the repudiation of the succession by the Fiscus, the goods were sold for the benefit of creditors. Vangerow, § 564.

Escheat (derived from exciduta, the medieval participle of excidere) is etymologically the same word as caducum and denotes to a certain extent a similar destination of property.

By English law, if a man dies intestate, and without kindred,

the devolution of his property follows different rules according as it is real or personal. By feudal law, if a vassal holding a transmissible feud died without heirs, his feud escheated or reverted to the lord. So in England if a tenant in fee die without leaving lawful heirs, for instance, if he leaves no relations but aliens (who are incapable of holding land), his land escheats to the lord of the fee. But the personal property of a man who dies intestate and without kindred, goes to the crown, subject always to the widow's right to a moiety in case she survive.

§ 151. This paragraph is due to Krueger, and is founded upon the apograph or facsimile edition of Gaius, recently published by Studemund, as the fruits of a new examination of the Veronese manuscript.

Gaius here states that as a grant of bonorum possessio might be rendered ineffective (sine re) in consequence of the superior claims of another person by whom the possessor may be evicted, so the recovery of the civil inheritance by hereditatis petitio might be rendered unavailing by ablation or ereption for Indignitas.

Ereption for indignitas, an institution which survived in the legislation of Justinian, D. 34, 9, C. 6, 35, was a case of want of capacitas, as opposed to want of testamentifactio passiva, on the part of honoratus. Some grounds of Ereption were common to the heir and legatee, others peculiar to the heir, others peculiar to the legatee. The forfeiture of the inheritance or legacy was sometimes in favour of the Fiscus, sometimes in favour of other persons, usually of those who would have taken but for the disposition in favour of indignus.

Instances of grounds for which either heir or legatee forfeited their interest to the Fiscus were: a secret unlawful trust, coercion of the testator in respect of his will, neglect to avenge the death of the testator, a suit denying the status of the testator, impeachment of the will for inofficiositas, demand of contra-tabular possession, &c.

Grounds for which their shares were forfeited to other persons than the Fiscus were: refusal of the office of guardian when the prospect of the discharge of this duty was the motive of the testator's bounty, refusal to undertake the education of an infant child of the testator, neglect of the testator's burial, &c.

Grounds on which the heir alone forfeited the whole or part of his inheritance to the Fiscus were: concealment of a portion of the

hereditaments in order to defraud a legatee (whereupon the heir forfeited the fourth which he was entitled to retain from such legacy by the lex Falcidia), the discovery that though putative son he was not a genuine son of the testator, the deliberate cancellation of his name by the testator, the imperfect execution of a subsequent will in which he was excluded from the heritage, a codicillary declaration of his unworthiness to inherit, &c.

Grounds on which an heir forfeited his portion to persons other than the Fiscus were: neglect on the part of a mother to demand a guardian for her infant child, a second marriage by a mother who herself is guardian before she has caused another guardian to be substituted, neglect of a lunatic testator, neglect to ransom the testator, criminal prosecution of testator, &c.

Grounds exclusively affecting a legatee and that in favour of the successor are theft from the heritage and concealment of the testator's will.

One of the grounds of Ereption we have seen to be the imperfect Rupture of a will. The Rupture (ruptio) of a will was produced by two circumstances: (1) Agnatio postumi, the subsequent birth of a self-successor, or the coming into existence of a quasi postumus, § 139: and (2) Revocation. On the principle, Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est (3 § 174), the most formal Revocation of a will would be the execution of a subsequent will. Another mode of Revocation sanctioned by Justinian depended on two conditions: a declaration attested by three witnesses or made in the form of a record or protocol deposited in the archives of a court, and the expiration of ten years from the date of the execution of the will, C. 6, 23, 27.

The mere cancellation or obliteration of a will was an informal Revocation and left the will valid at civil law: the devisee, however, was not allowed to take the inheritance against this evidence of the testator's change of intention, but forfeited the succession as indignus. The rescript of Marcus Aurelius to this effect, to which Gaius alludes, is preserved in the Digest, 28, 4, 3. The forfeiture according to Gaius and to Papinian, D. 34, 9, 12, was in favour of the Fiscus: but according to Ulpian, D. 38, 6, 18, and Paulus, D. 28, 4, 4, it was sometimes in favour of the persons entitled by intestacy.

Justinian ordained that a will should be perfectly Revoked and

completely avoided by the cutting of the cords, or removal of the seals, or other intentional destruction of the outward signs of its due solemnization, C. 6, 23, 30. Vangerow, § 565.

DE HEREDUM QUALITATE ET DIFFERENTIA.

§ 152. Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.

§ 152. Successors are necessary, self-successors and necessary, or external.

§ 153. Necessarius heres est servus cum libertate heres institutus; ideo sic appellatus, quia, sive velit sive nolit, omnimodo post mortem testatoris protinus liber et heres est.

§ 153. A necessary successor is a slave enfranchised and instituted heir, so called because, willing or unwilling, without any alternative, on the death of the testator he immediately has his freedom and the succession.

§ 154. Unde qui facultates suas suspectas habet, solet servum primo aut secundo vel etiam ulteriore gradu liberum et heredem instituere, ut si creditoribus satis non fiat, potius huius heredis quam ipsius testatoris bona veneant, id est ut ignominia quae accidit ex venditione bonorum hunc potius heredem quam ipsum testatorem contingat; quamquam aput F*u*fidium Sabino placeat eximendum eum esse ignominia, quia non suo vitio, sed necessitate iuris bonorum venditionem pateretur: sed alio iure utimur.

§ 154. For when a man's affairs are embarrassed, it is common for a slave, either in the first place or as a substitute in the second or any inferior place, to be enfranchised and appointed heir, so that, if the creditors are not paid in full, the heir is insolvent instead of the testator, and the ignominy of insolvency attaches to the heir instead of the testator; though, as Fufidius relates, Sabinus held that he ought to be exempted from ignominy, as it is not his own fault, but legal compulsion, that makes him insolvent; this, however, is not the law.

§ 155. Pro hoc tamen incommodo illu*d* ei commodum praestatur, ut ea quae post mortem patroni sibi adquisierit, sive ante bonorum venditionem sive postea, ipsi reserventur. et quamvis *pro portione* bona venierint, iterum ex hereditaria causa bona eius non venient, nisi si qui*d* ei ex hereditaria causa fuerit adquisitum, velut si *ex eo quod* Latinus adquisierit, locupletior factus sit; cum ceterorum hominum quorum bona venierint pro portione, si quid postea adquirant, etiam saepius eorum bona veniri solent.

§ 155. To compensate this disadvantage he has the advantage that his acquisitions after the death of his patron, and whether before or after the sale, are for his own benefit, and although a portion only of the debts is satisfied by the sale, he is not liable to a second sale of his after-acquired property for the debts of the testator, unless he gain anything as heir, if he inherit, for instance, the property of a Latinus Junianus, another freedman of the testator; whereas other persons, who only pay a dividend, on subsequently acquiring any property, are liable to repeated sales.

§ 156. Sui autem *et* necessarii heredes sunt velut filius filiave, nepos neptisve ex filio, deinceps *ceteri*, qui modo in potestate morientis fuerunt. sed uti nepos neptisve su*us* heres sit, non sufficit eum in potestate avi mortis tempore fuisse, sed opus est, ut pater quoque eius vivo patre suo desierit suus heres esse, aut morte interceptus aut qualibet ratione liberatus potestate: tum enim nepos neptisve in locum sui patris succedunt.

§ 156. Self-successors and necessary are such as a son or daughter, a grandson or granddaughter by the son, and further similar lineal descendants, provided that they are under the power of the ancestor when he dies. To make a grandson or granddaughter self-successor it is, however, not sufficient that they were in the power of the grandfather at the time of his death, but it is further requisite that their father in the life of the grandfather shall have ceased to be self-successor, whether by death or by any other mode of liberation from parental power, as the grandson and granddaughter then succeed to the place of the father.

§ 157. Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque parente quoda*m* modo domini existimantur. unde etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. necessarii vero ideo dicuntur, quia omnimodo, *sive* velint *sive* *nolint*, *tam* ab intestato quam ex testamento heredes fiunt.

§ 157. They are called self-successors because they are members of the family, and even in the lifetime of the parent are deemed to a certain extent co-proprietors; wherefore in intestacy the first right of succession belongs to the children. They are called necessary, because they have no alternative, but, willing or unwilling, both in testacy and intestacy, they become successors.

§ 158. Sed his Praetor permittit abstinere se ab heredi*tate*, ut potius parentis bona veneant.

§ 158. The praetor, however, permits them to abstain from the succession, and leave the ancestor to be declared insolvent.

§ 159. Idem iuris est et *in* uxoris persona quae in manu est, quia filiae loco est, et in nurus quae in manu filii est, quia neptis loco est.

§ 159. The same rule governs a wife in the hand of a husband, for she is on the footing of a daughter, and a son's wife in the hand of the son, for she is on the footing of a granddaughter.

§ 160. Quin etiam similiter abstinendi po*te*statem facit Praetor etiam [mancipato, id est] ei qui in causa mancipi*i* est, cum liber et heres institutus sit; cum necessarius, non etiam suus heres sit, tamquam servus.

§ 160. A similar power of abstention is granted by the praetor to a person held in mancipation when enfranchised and made successor, although he is a necessary successor and not a self-successor, mancipation being assimilated to servitude.

§ 161. Ceteri qui testatoris iuri subiecti non sunt extranei heredes

§ 161. Those who were not subject to the testator's power are called

appellantur. itaque liberi quoque nostri qui in potestate nostra non sunt, heredes a nobis instituti sicut extranei videntur. qua de causa et qui a matre heredes instituuntur eodem numero sunt, quia feminae liberos in potestate non habent, servi quoque qui cum liber*tate* heredes instituti sunt et postea a domino manumissi, eodem numero habentur.

strangers, or external successors. Thus children not in our power, if instituted successors, are deemed strangers; and children instituted by their mother belong to this class, because women are not invested with power over their children. Slaves instituted heirs with freedom annexed, and subsequently manumitted, belong to the same class.

§ 162. Extraneis autem heredibus deliberandi potestas data est de adeunda hereditate vel non adeunda.

§ 162. External or voluntary successors have the right of deliberating whether they will accept or disclaim a succession.

§ 163. Sed sive is cui a*b*stinendi potestas e*s*t immiscuerit se bonis hereditariis, sive is *c*ui de adeunda *hereditate* deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum XXV. nam huius aetatis hominibus, sicut in ceteris omnibus causis, deceptis, ita etiam si temere damnosa*m* hereditatem susceperint, Praetor succurrit. scio quidem divum Hadrianum etiam maiori XXV annorum veniam dedisse, cum post aditam hereditatem grande aes alienum quod aditae hereditatis tempore latebat apparuisset.

§ 163. But if a person who has the power of abstention interferes with the succession, or a person who has the power of deliberation accepts, he has no longer the power of relinquishing the inheritance, unless he is a minor under twenty-five years of age; for minors, both when they take any other injudicious step, and when they incautiously accept a disadvantageous inheritance, obtain relief from the praetor. The late Emperor Hadrian even relieved a person who had attained his majority, when, after his acceptance of a succession, a great debt, unknown at the time of acceptance, had come to light.

§ 164. Extraneis heredibus solet cretio dari, id est finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant, temporis fine summoveantur. ideo autem cretio appellata est, quia cernere est quasi decernere et constituere.

§ 164. External heirs are commonly allowed an interval for decision, that is, a definite delay for deliberation, within which time they must accept, and in default of acceptance are barred. It is a term for decision, because it is a term within which the heir must come to a determination and resolution.

§ 165. Cum ergo ita scri*p*tum sit: HERES TITIUS ESTO: adicere debemus; CERNITOQUE IN CENTUM DIEBUS PROXUMIS QUIBUS SCIES POTERISQUE. QUOD NI ITA CREVERIS, EXHERES ESTO.

§ 165. Accordingly, after the words, 'Titius, be thou my heir,' we ought to add, 'and declare whether thou accept within a hundred days in which thou knowest of thy institution and hast power to declare; or in default of so declaring be thou disinherited.'

§ 166. Et qui ita heres institutus est si velit heres esse, debebit intra diem cretionis cernere, id est haec verba dicere: QUOD ME PUBLIUS *MAEVIUS* TESTAMENTO SUO HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNOQUE. Quodsi ita non creverit, finito tempore cretionis excluditur: nec quicquam proficit, si pro herede gerat, id est si rebus hereditariis tamquam heres utatur.

§ 166. And the successor thus appointed, if he wish to inherit, must within the term prescribed declare his decision in the following words: 'Whereas Publius Mevius in his will has made me his successor, that succession I hereby accept and undertake.' In default of such declaration, the elapsing of the period allowed shuts him out from the inheritance, and it is of no avail that he behave as successor, that is, deal with the estate of the deceased as proprietor.

§ 167. At is qui sine cretione heres institu*tus* sit, aut qui ab intestato legitimo iure ad hereditatem vocatur, potest aut cernendo aut pro herede gerendo vel etiam nuda voluntate suscipiendae hereditatis heres fieri: eique liberum est, quocumque tempore voluerit, adire hereditatem. *sed* solet Praetor postulantibus hereditariis creditoribus tempus constituere, intra quod si velit adeat hereditatem: si minus, ut liceat creditoribus bona defuncti vendere.

§ 167. In the absence of a prescribed term for deliberation, and in intestate succession at civil law, a man takes the inheritance either by formal declaration, or by acts of ownership, or by informal declaration, and is not barred from accepting by any lapse of time; but it is usual for the praetor, at the demand of the creditors of the deceased, to appoint a period, on the expiration of which without his acceptance the creditors are permitted to put up the estate of the deceased for sale.

§ 168. Sic*ut* autem cum cretione heres institutus, nisi creverit hereditatem, non fit heres, ita non aliter excluditur, quam si non creverit intra id tempus quo cretio finita si*t*. itaque licet ante diem cretionis constituerit hereditatem non adire, tamen paenitentia actus superante die cretionis cernendo heres esse potest.

§ 168. When a term is prescribed for declaring, a man is barred by not declaring, but only by not declaring within the last day of the appointed term; and though, pending the term, he may have elected to disclaim, yet if he change his mind before the time is expired and declare his acceptance, he takes the estate.

§ 169. At hic qui sine cretione heres institutus est, quique ab intestato per legem vocatur, sicut voluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur.

§ 169. If no term is prescribed in the institution, or if a man is entitled by intestacy at civil law, just as an informal declaration makes him heir, so the contrary declaration immediately bars him from the succession.

§ 170. Omnis autem cretio certo tempore constringitur. in quam rem tolerabile tempus visum est centum dierum: potest tamen nihilominus

§ 170. Every period of deliberation has a certain limit, and a reasonable limit is held to be a hundred days, yet by the civil law

iure civili aut longius aut brevius tempus dari: longius tamen interdum Praetor coartat.

a longer or shorter period is allowed to be fixed, though a longer period is sometimes shortened by the praetor.

§ 171. Et quamvis omnis cretio certis diebus constringatur, tamen alia cretio vulgaris vocatur, alia certorum dierum: vulgaris illa, quam supra exposuimus, id est in qua *a*diciuntur haec verba: QUIBUS SCIET POTERITQUE; certorum dierum, in qua detractis his verbis cetera scribuntur.

§ 171. Although, however, the time of deliberation is always limited to certain days, yet one mode of limitation is called ordinary, the other determinate; the ordinary being that above indicated, namely, with the addition of the words, 'after notice of institution and available for declaration;' determinate that in which these words are omitted.

§ 172. Quarum cretionum magna differentia est. nam vulgari cretione data nulli dies conputantur, nisi quibus scierit quisque se heredem esse institutum et possit cernere. certorum vero dierum cretio*ne* data etiam nescient*i* se heredem institutum esse numerantur dies continui; item ei quoque qui aliqua ex causa cernere prohibetur, et eo amplius ei qui sub condicione heres institutus est, tempus numeratur. unde melius et aptius est vulgari cretione uti.

§ 172. These modes are very different in effect, for when the ordinary period is allowed no days are computed until the heir has notice and is in a position to decide, but when a determinate period is allowed, notwithstanding the heir's want of notice of his institution, the days begin to be counted without intermission, and notwithstanding his inability from any cause to declare, or any condition annexed to his institution, nevertheless the days begin to be reckoned. Accordingly, it is better and more considerate to employ the ordinary mode of limitation.

§ 173. Continua haec cretio vocatur, quia continui dies numerantur. sed quia tamen dura est haec cretio, altera in us*u* habetur: unde etiam vulgaris dicta est.

§ 173. The determinate period is called continuous, because the days are reckoned without intermission. Because of the harshness of this condition the other is commonly employed, and hence is called ordinary.

§ 152. The rules of institution and disinheritance were restrictions of the unlimited power of testamentary disposition conferred by the Twelve Tables. The general tendency and purpose of these restrictions are to protect children against the caprice of parents, and to be fully comprehended they should be viewed in connection with three other branches of law, the rules respecting testamentum inofficiosum, the provisions of the lex Falcidia and those of the senatusconsultum Pegasianum. All

these limitations of testamentary power may be considered as correlations and compensations of the patria potestas. An English testator has unlimited power to dispose of his property, and natural feeling is supposed to be a sufficient guaranty that none of his children will be left without suitable provision. Of Roman testators Justinian says rather crudely: Plerumque parentes sine causa liberos suos vel exheredant vel omittunt, Inst. 2, 18, pr. 'Most parents disinherit or pretermit their children without any cause.' In spite of this expression, we may conjecture that parental caprice was not greater in Rome than in England, but the monstrous development of the patria potestas, whereby the person and fortunes of the child were entirely at the mercy of the father during his lifetime, made any instance of testamentary caprice seem more iniquitous, more intolerable, in Rome than it would in England. The restrictions were as follows:—

(1) We have seen that a suus heres must either be instituted or disinherited. This secured him against being simply forgotten.

(2) If he was disinherited without a cause, or received less than one fourth of his share by descent (quarta legitimae), he could by impeaching the will as immoral or unnatural (querela inofficiosi testamenti) have it set aside on the fictitious preusmption of the testator's insanity. The presumption, at least, was so far fictitious that it was not allowed to be rebutted by any other proof of his sanity except proof of the adequacy of the motives for which the child was disinherited. The querela inofficiosi was a form of petitio hereditatis, that is, a real action, and fell under the jurisdiction of the centumviral court. The amount which must be devised to a suus heres to save a will from avoidance for inofficiositas was probably fixed by the lex Falcidia, for it is identical with the amount which that law secures to the child when instituted heir. The querela inofficiosi could not only be brought by suus heres but by certain other near relatives, namely, parents, brothers, and sisters, and by children against their mothers' will; in which cases, it must be confessed, the alleged motive, compensation for the patria potestas, is wanting.

(3) Although a suus heres were instituted heir, yet the institution might be made illusory by the exhaustion of the whole inheritance in legacies, leaving nothing to the heir but the burden of administration. To meet this, the lex Falcidia provided that when more than three fourths of an inheritance is absorbed in legacies,

all the legacies should abate proportionably so as to leave the heir a clear fourth of the portion in which he was instituted (quarta Falcidiae).

(4) The senatus consultum Pegasianum provided against the inheritance being similarly exhausted by fideicommissa.

We may add that an infant adopted by adrogation, if disinherited or without cause emancipated, was entitled to one fourth of the inheritance of his adoptive father (quarta Antonini), 1 § 102.

§ 157. Communism or co-ownership appears to be an older institution than divided or individual ownership. Even after the rights of the paterfamilias had been enormously developed at the expense of the rest of the household, a vestige of the times when property vested rather in the family than in the chief was preserved in the rules respecting the suus heres. Suus heres appears equivalent to sibi heres, and implies that he who now enters on proprietary rights in the character of paterfamilias had already possessed proprietary rights over the same subject matter in the character of filiusfamilias.

Less barbarous than self-successor (the term chosen to represent suus heres as expressing sibi heres) but too long for perpetual use, would have been the circumlocution, immediate lineal successor. Suus heres is a lineal descendant as opposed to the legitimus heres or agnate, who is a collateral relation: and he is an immediate successor as opposed to an eventual successor. For instance, a grandson by an unemancipated son is in the grandfather's power, and may eventually be his successor, but is not his suus heres during the life of the son.

§ 162. After accepting an inheritance the heir became liable to the testator's creditors for the full amount of the testator's debts. To avoid the danger of accepting an inheritance more onerous than lucrative he might by application to the praetor obtain a delay of a hundred days for deliberation.

Justinian introduced the benefice of Inventory, reducing the liability of an heir who made the required inventory to the extent of the assets that came to his hands. The inventory must be commenced within thirty days from notice of the inheritance and completed in sixty other days. It must be executed in the presence of a notary (tabellarius) and the persons interested or three witnesses.

By English law the executor in every case is bound to make an

inventory, and in no case is he answerable to the testator's creditors beyond the assets that come to his hands, unless for a sufficient consideration he make his own estate chargeable by a written engagement, as provided by the Statute of Frauds.

§ 165. When a right is extinguished by inactivity prolonged for a certain period, the period has two modes of measurement: either every day is counted, and then the period is called tempus continuum; or only available days, days on which activity is possible, are counted; and then the period is called tempus utile. When a general rule prescribes a term, not greater than a year, within which certain steps must be taken before a court or judicial authority, on pain of forfeiting certain rights, such a term must be measured as tempus utile. Such are the rules requiring certain suits to be instituted within a year from their nativity, that is, limiting a year for their period of prescription; and the rule requiring the demand of the possession of a heritage (agnitio bonorum possessionis), whether testate or intestate, to be made, if the claimant is an ascendant or descendant, within a year; if he is a stranger, within a hundred days. When the step required is rendered impossible, not by a permanent obstacle, such as infancy, lunacy, prodigality, or juristic personality, but by some transitory circumstance, the days on which the action is hindered are excluded from the computation of the term.

Such hindrance (1) may relate to the person entitled, and then will be his captivity, or his absence on public service, or his detention by weather or illness, coupled with inability to appoint a procurator:

(2) Or, in the case of the limitation of actions, it may relate to the person of the defendant: if, for instance, he is unknown, or concealed, or absent and undefended:

(3) Or it may consist in the absence of the praetor from the court. Such absence might be accidental, or it might arise from the regular intermission of the dies juridici, or days on which the praetor performed his judicial functions, 2 § 279. As in the time of Marcus Aurelius, such days only amounted to 230 in a year (Suetonius, Octavianus, 32), this cause alone would make annus utilis equivalent to about 1½ ordinary years. The intermission of dies juridici was doubtless the principal cause of a claimant's inability to perform an act in court on certain days: but in contemporary Roman law, now that judicial acts consist in delivery

of writings at the office of a court irrespectively of its session days and vacations, this cause has lost its importance.

Knowledge (scientia) of the fact that he is entitled is not necessarily requisite on the part of the person entitled: in other words his ignorance is not always sufficient to exclude a day from the number of dies utiles. The prescription of an action, when it is accomplished in annus utilis, begins to run from its nativity (actio nata), irrespectively of the plaintiff's knowledge of his right to sue. Ignorance of a right of action is generally the effect of Negligence, and therefore undeserving of relief, and might be protracted for an indefinite period. On the contrary, ignorance is sometimes a condition that delays the commencement of tempus continuum: for instance, the 50 dies continui allowed to a person for stating the grounds on which he was entitled to be excused from accepting a guardianship only began to run when he had notice of his nomination, Inst. 1, 25, 16: which shows that scientia and ignorantia have no necessary relation to the distinction of dies utiles and dies continui.

In the demand (agnitio) of possession, however, by the claimant of a testate or intestate succession, the edict expressly made the scientia as well as the potestas of the claimant a condition of dies utilis, D. 38, 15, 2. Indeed the aditio of an inheritance was not valid unless made with a knowledge of the fact of the delatio and of its nature, whether testacy or intestacy. Moreover the ignorance of his rights could not be ascribed to the negligence of the person entitled, nor was it likely to be indefinitely protracted, as it would be the interest of the person next entitled to give him notice of the delation. Knowledge will generally only affect the beginning of a term, and the person who is once made aware of the delation of an inheritance will usually continue aware: but it is possible that a period of error should supervene; for instance, that, after an agnate has notice that he is entitled by intestacy and after his term for acceptance has commenced to run, a forged will should be produced and obtain credit: in which case the dies utiles would not continue to run until the forgery of the will was ascertained. Savigny, § 189.

The testamentary clause allowing a term for Cretio vulgaris, like the edict relating to bonorum possessio, made scientia as well as potestas a condition of temporis utilitas.

§ 173. The formularies of cretio, after being dispensed with in

certain cases by other emperors, were totally abrogated by Justinian: Cretionum scrupulosam sollennitatem hac lege penitus amputari decernimus, Cod. 6, 30, 17. 'Declaration with its embarrassing formalities is hereby decreed to be absolutely abolished.' When it became customary for the praetor to grant to any devisee who desired it a hundred days for deliberation, the designation of such a period by the testator became unnecessary.

No time was prescribed for the aditio of the civil inheritance, § 167: for the acquisition (agnitio) of the praetorian succession we have seen that a year or a hundred days was prescribed, Inst. 3, 9, 9. Agnitio could be made by a procurator or agent, D. 37, 1, 3, 7: not so aditio, D. 29, 2, 90.

DE VULGARI SUBSTITUTIONE.

§ 174. Interdum duos pluresve gradus heredum facimus, hoc modo: LUCIUS TITIUS HERES ESTO CERNITOQUE IN DIEBUS *CENTUM* PROXIMIS QUIBUS SCIES POTERISQUE. QUOD NI ITA CREVERIS, EXHERES ESTO. TUM MAEVIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM et reliqua: et deinceps in quantum velimus substituere possumus.

§ 174. Sometimes two or more degrees of heirs are instituted, as follows: 'Lucius Titius, be thou my successor, and declare within a hundred available days after notice of delation: or, in default of so declaring, be disinherited. Then, Mevius, be thou my successor, and declare within a hundred days,' &c.; and in this way we can make as many substitutions as we like.

§ 175. Et licet nobis vel unum in unius locum substituere pluresve, et contra in plurium locum vel unum vel plures substituere.

§ 175. We may substitute in place of one either one or several, and, conversely, in the place of several we may substitute either several or one.

§ 176. Primo itaque gradu scriptus heres hereditatem cernendo fit heres et substitutus excluditur; non cernendo summovetur, etiam si pro herede gerat, et in locum eius substitutus succedit. et deinceps si plures gradus sint, in singulis simili ratione idem contingit.

§ 176. Accordingly, if the person instituted in the first degree accepts the inheritance, he is heir, and the substitutes are excluded: if he fail to declare, he is barred in spite of acts of ownership, and his place is taken by the substitute; and if there are several degrees, in every one a similar result occurs.

§ 177. *Sed* si cretio sine exheredatione sit data, id est *in* haec verba: SI NON CRE*V*ERIS TUM PUBLIUS MAEVIUS HERES ESTO, illu*d* diversum invenitur, quia si prior omissa cretione pro herede gerat, substitutus in partem admittitur, et fiunt ambo aequis partibus here-

§ 177. If power of deliberation is conferred without a clause of disherison, that is, in these words: 'If thou fail to declare, be Publius Mevius my heir,' the result is herein different, that, if the person first instituted, though he omit the declaration, act as heir, the substitute

des. *quod* si neque cernat neque pro herede gerat, sane in univers*um* summovetur, et substitutus in totam hereditatem succedit.

is only admitted to a portion, and both take a moiety: if he neither declare nor act as heir, he is entirely excluded, and the substitute takes the whole.

§ 178. Sed d*u*dum quidem placuit, quamdiu cernere et eo modo heres fieri possit prior, etiam si pro herede gesserit, non tamen admitti substitutum: cum vero cretio finita sit, tum pro herede gerente*m* ad*mittere* *s*ubstitut*um*: *olim* vero placuit, etiam superante cretione posse eum pro herede gerendo in partem substitutum admittere et amplius ad cretionem reverti non posse.

§ 178. It is now a well-established rule that, as long as a term prefixed for declaring and taking the succession subsists, if a person in a higher grade act as heir, he does not let in the substitute, and that even after the expiration of the term his acts of heirship make him coheir with the substitute. It once was held that, even pending the allotted term, acts of heirship let in the substitute and bar the prior heir from reverting to his right of formal declaration.

DE PUPILLARI SUBSTITUTIONE.

§ 179. Liberis nostris inpuberibus quos in potestate habemus non solum ita, ut supra diximus, substituere poss*u*mus, id est ut *si* heredes non *ex*titerint, alius nobis heres sit; sed eo amplius, ut etiam si heredes nobis extiterint et adhuc impuberes mortui fuerint, *s*it iis aliquis heres, velut hoc modo: TITIUS FILIUS MEUS MIHI HERES ESTO. SI FILIUS MEUS MIHI *HERES NON ERIT SIVE HERES* ERIT ET *PRIUS* MORIATUR QUAM IN SUAM TUTELAM VENERIT, SEIUS HERES ESTO.

§ 179. To children below the age of puberty in the power of the testator, not only can such a substitute as we have described be appointed, that is, one who shall take the succession on their failure to inherit, but also one who, if after inheriting they die before attaining the age of puberty, shall be their successor; which may be done in the following terms: 'Be my son Titius my successor, and if my son does not become my successor, or after becoming my successor die before attaining the age of puberty, then be Seius the successor.'

§ 180. Quo casu si quide*m* non extiterit heres filius, substitutus patri fit heres: *si vero* heres extiterit filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. quamobrem duo quodammodo sunt testamenta: a*li*ud patris, aliud filii, tamquam si ipse filius sibi hered*e*m instituisset; aut certe unum est testament*u*m duarum hereditatum.

§ 180. In which case, if the son fail to inherit, the substitute is the heir of the testator, but if the son die after inheriting and without attaining the age of puberty, the substitute is heir to the son. Thus there are two wills, so to speak, the father's and the son's, just as if the son had made a successor; or at any rate there is one will dealing with two inheritances.

§ 181. Ceterum ne post obi*tum* parenti*s* periculo insidiarum sub-

§ 181. However, to save the ward from the danger of foul play

iectus videatur pupillus, in usu est vulgarem quidem substitutionem palam facere, id est eo loco quo pupillum heredem instituimus: *nam* vulgaris substitutio ita vocat ad hereditatem substitutum, si omnino pupillus heres non extiterit; quod accidit cum vivo parente moritur, quo casu nullum substituti maleficium suspicari possumus, cum scilicet vivo testatore omnia quae in testamento scri*p*ta sint ignorentur. illam autem substitutionem per quam, etiamsi heres extiterit pupillus et intra pubertatem decesserit, substitutum vocamus, separatim in inferioribus tabulis scribimus, easque tabulas proprio lino propriaque cera consignamus; et in prior*i*bus tabulis cavemus, ne inferiores tabulae vivo filio et adhuc inpubere aperiantur. Se*d* longe *t*utius est utrumque genus substitutionis separatim in inferioribus tabulis consignari, quod si *ita* consignatae vel separatae fuerint substitutione*s*, ut diximus, e*x* priore potest intellegi in altera [alter] quoque idem esse substitutus.

after the death of the parent, it is common for the ordinary substitution to be made openly, that is, in the clause wherein the ward is instituted, for as the ordinary substitution only calls a man to the succession in case of the ward altogether failing to inherit, and this can only occur by his death in the lifetime of his parent, the substitute in this case is open to no suspicion of crime, because while the testator is alive the contents of the will are a secret. But the substitution wherein a man is named heir on the succession and death of the ward is written separately on later tablets, tied with their own cords and sealed with their own wax, and prohibited in the prior tablets to be opened in the lifetime of the son before he attains the age of puberty. Indeed it is far safer that both kinds of substitution should be sealed up separately in two subsequent tablets, for if the ordinary substitution is contained in the first tablets it is easy to conjecture that the same substitute is appointed in the second.

§ 182. Non solum autem heredibus institutis inpuberibus liberis ita substituere poss*u*mus, ut si ante pubertatem mortui fuerint, sit is heres quem nos voluerimus, sed etiam exheredatis. itaque eo casu si quid pupillo ex hereditatibus legatisve aut donationibus propinquorum adquisitum fuerit, id omne *ad* substitutum pertinet.

§ 182. Not only when we leave our succession to children under the age of puberty can we make such a substitution that if they die before puberty the substitute is their successor, but we can do it when we disinherit them, so that whatever the ward acquires by devises, legacies, donations of his relatives, all passes to the substitute.

§ 183. Quaecumque diximus de substitutione inpuberum libe*ro*rum, vel heredum institutorum vel exheredatorum, eadem etiam de postumis intellegemus.

§ 183. What has been said of substitution to children below the age of puberty, whether appointed heirs or disinherited, is true of substitution to afterborn children.

§ 184. Extraneo vero heredi instituto ita substituere non possumus, ut si heres extiterit et intra aliquod tempus decesserit, alius ei heres sit: sed hoc solum nobis per-

§ 184. To a stranger instituted heir we cannot appoint a substitute who, if the stranger inherit and die within a certain time, shall be his successor: we have only the power

missum est, ut eum per fideicommissum obligemus, ut hereditatem nostram vel totam vel *pro* parte restituat; quod ius quale sit, suo loco trademus.

to bind him by a trust to convey the inheritance to another, in part or in whole, a right which shall be explained in the proper place. [2 § 277.]

§ 177. A constitution of Marcus Aurelius changing this rule, and mentioned by Ulpian: Sed postea divus Marcus constituit, ut et pro herede gerendo ex asse fiat heres, 22, 34: 'Subsequently Marcus Aurelius enacted that acts of heirship should make him exclusive heir,' was clearly not enacted when this paragraph was written by Gaius, and furnishes an indication of the date at which this book of his Institutions was published. Marcus Aurelius was sole emperor A.D. 169–176.

§ 179. Cicero frequently mentions a great case in which the question arose whether a vulgaris substitutio may be implied from a pupillaris substitutio. The centumviral court decided that the intention rather than the words of the testator should prevail, and that the heir appointed to succeed the son in case the son died before puberty should be deemed appointed to succeed the testator in case no son was born: Malim mihi L. Crassi unam pro M'. Curio dictionem quam castellanos triumphos duos, Brutus, 73. 'I would rather have made the single speech of Lucius Crassus for Manius Curius than have had two triumphs for the capture of fortresses.' The other passages are worth referring to, De Orat. 1, 39, 57; 2, 6, 32; Brutus, 39, 52; Pro Caecina, 18; Topica, 10. Marcus Aurelius enacted that in every case pupillaris substitutio should be implied in vulgaris substitutio and vice versâ, unless the contrary intention was expressed, Dig. 28, 6, 4.

§ 184. That is to say, we cannot limit an estate in remainder so that it shall take effect, without the aid of reconveyance, after the determination of the intervening estate for life. All we can do is to direct the tenant for life to reconvey at his death to the remainderman.

DE HEREDIBUS INSTITUENDIS.

§ 185. Sicut autem liberi homines, ita et servi, tam nostri quam alieni, heredes scribi possunt.

§ 185. Not only freemen but slaves, whether belonging to the testator or to another person, may be instituted heirs.

§ 186. *Sed* noster servus simul et liber et heres esse iuberi debet, id est hoc modo: STICHUS SERVUS

§ 186. A slave belonging to the testator must be simultaneously instituted and enfranchised in the

MEUS LIBER HERESQUE ESTO, vel HERES LIBERQUE ESTO.

following manner: 'Stichus, my slave, be free and be my heir;' or, 'Be my heir and be free.'

§ 187. Nam si sine libertate heres institutus sit, etiam si postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona eius non constitit; ideoque licet alienatus sit, non potest iussu domini cernere hereditatem.

§ 187. If he is not enfranchised at the same time that he is instituted, no subsequent manumission by his owner enables him to take the succession, because the institution is originally void, and if aliened he cannot declare his acceptance by the order of the alienee.

§ 188. Cum libertate vero heres institutus, si *quidem in eadem causa manserit, fit* ex testamento liber *idemque* necessarius heres. si vero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest. quodsi alienatus sit, iussu novi domini *adire hereditatem debet, et ea* ratione per eum dominus fit heres: *nam ipse alienatus neque* heres neque liber esse potest.

§ 188. When a slave is simultaneously instituted and enfranchised, if he continue in the same condition, the will converts him into a freeman and a necessary heir: if the testator himself manumits him in his lifetime, he may use his own discretion about acceptance: if he is aliened he must have the order of his new master to accept, and then his master through him becomes successor, the alienated slave himself becoming neither successor nor free.

§ 189. Alienus quoque servus heres institutus, *si in* eadem causa duraverit, iussu domini hered*it*atem adire debet; si vero alienatus fue*rit ab eo, aut vivo* testatore aut post mortem eius ante*quam adeat, debet iussu novi* domini cernere. si *manumissus est antequam adeat,* suo arbitrio adire hereditatem potest.

§ 189. When another person's slave is instituted heir, if he continue in the same position, he must have the order of his master to accept the succession: if aliened by him in the lifetime of the testator, or before acceptance, he must have the order of the alienee to accept: if manumitted before acceptance, he may follow his own judgment as to accepting.

§ 190. *Si* autem servus alienus heres institutu*s est* vulgari cretione data, ita i*ntelle*gitur dies cretionis ceder*e, si* ipse servus scierit se heredem institutum esse, nec ullum impedimentum sit, quominus certiorem dominum faceret, ut illius iussu cernere possit.

§ 190. When a slave of another person is instituted heir with the ordinary term allowed for deliberation, the term only begins to run when the slave has notice of his appointment, and is not disabled from informing his master so that he may obtain his order for acceptance.

§ 187. This rule was abolished by Justinian, who enacted that the enfranchisement of the testator's slave, though unexpressed, should always be implied in his institution as heir.

§ 188. Justinian explains why the slave lost his liberty: Des-

titisse enim a libertatis datione videtur dominus qui eum alienavit, Inst, 2, 14, 1. 'A revocation of the bequest of liberty is inferred from the fact of his alienation.' If we ask why the implied intention that suffices to revoke the enfranchisement does not suffice to revoke the institution, the answer is, that a bequest can be revoked by implied intention, whereas an institution requires a more solemn revocation, by cancellation of the will, or execution of a later will, or some other means, 2 § 151.

§ 189. What was the motive of instituting as successor the slave of another person? Such a disposition could not be dictated by kindness to the slave, for he would gain nothing by his institution; but was a device adopted for two purposes, (1) for facilitating the conversion of a succession into money, and (2) for securing a devise against lapse.

(1) By such a disposition the testator gave the devisee who was proprietor of the slave the option of either becoming actual successor, or of doing, what he could not otherwise readily do [2 § 36], i. e. of receiving the net value, or a large portion of the net value, of the succession, without incurring the expense of the annexed sacred rights (sacra) and the burden of administration, by practically selling the succession for the highest price he could get to any one who was willing to incur these expenses and troubles as a matter of speculation. To effect this, he had only to sell the slave at a price enhanced by his character of institutus. The slave thereupon, making aditio of the inheritance in obedience to an order of the purchaser, vested the inheritance in the purchaser. If the former proprietor was reluctant to part with his slave, he had only to bargain for his reconveyance by a fiducia or covenant annexed to the sale or mancipatio. Reddendus (i. e. mancipandus) est servus ea conditione ut, cum jussu ejus adierit, rursum retradatur, D. 28, 3, 58. By this branch of speculation the instituted slave might pass through many hands before the succession vested, D. 37, 11, 2, 9.

(2) A second object gained by the institution of another person's slave was the transmission of an inheritance to the heirs of an intended devisee. If the devisee died in the lifetime of the testator, the devise lapsed, and the lapse could not be prevented by the substitution (secondary institution) of the heir of the devisee, for such heir would be a persona incerta, § 242. The difficulty was met by instituting a slave, who on the death of his master, the

virtual devisee, would become the slave of the devisee's successor, and acquire for him the succession of the testator. To guard against the contingency of the death of the slave in the lifetime of the testator, several slaves might be instituted by way of substitution. Ihering, § 56.

§ 190. In the corresponding title of the Institutes, Justinian mentions that an heir might either be appointed to take the whole of an inheritance or to share it with other coheirs in any proportions. We may briefly state the technical terms and rules of interpretation by which different shares were allotted. An inheritance was commonly regarded as a pound (as) consisting of twelve ounces (unciae). The different fractions were thus denominated: uncia, a twelfth of an as, or an ounce; sextans, a sixth of an as, or two ounces; quadrans, a fourth of an as, or three ounces; triens, a third of an as, or four ounces; quincunx, five ounces; semis, half an as, or six ounces; septunx, seven ounces; bes (bis triens), two thirds of an as, or eight ounces; dodrans (deme quadrantem), an as minus a fourth, or nine ounces; dextans (deme sextantem), an as minus a sixth, or ten ounces; deunx (deme unciam), an as minus an ounce, or eleven ounces; as, twelve ounces.

An heir instituted in twelve ounces (ex asse) took the whole: but it was a rule that no one could be partly testate and partly intestate, and therefore if an heir were instituted in a part (ex parte) and no other coheir instituted, that part represented a pound, and the heir took the whole. So if the shares allotted to several coheirs amounted to more than twelve ounces, then, if no other heir was appointed with an unexpressed share, the as was deemed to consist of more than twelve ounces, and each coheir took a ratable part of the inheritance. If one heir were instituted in a part, say ex besse, and a coheir were instituted for whom no part was expressed, then the coheir would take the residue of the as, that is, would be deemed to be instituted ex triente. But if the parts expressed for certain heirs exhausted or exceeded the as and another heir or heirs were named without express shares, then the whole inheritance was supposed to consist of two asses (dupondius) and the expressed shares were reduced to so many ounces out of twenty-four, the heir or heirs with unexpressed parts taking the residue. Similarly, if necessary, the inheritance was supposed to consist of thirty-six ounces.

If the institution of one coheir lapsed, the shares of the remaining

coheirs were ratably augmented (accretio) just as, if originally less than twelve ounces had been distributed, the expressed shares of each would be ratably augmented so as to exhaust the inheritance.

This rule, however, was modified by the leges caducariae, passed chiefly to discourage celibacy, namely the lex Julia de maritandis ordinibus, A.D. 4, and the lex Papia Poppaea, on marriage and succession, A.D. 9, in which the provisions of the lex Julia were incorporated, for which reason both laws are sometimes referred to as lex Julia et Papia.

Caducum is a devise or bequest, valid at Civil law, but vacated by some particular statute: Quod quis sibi testamento relictum ita ut jure civili capere possit, aliqua ex causa non ceperit, caducum appellatur, veluti ceciderit ab eo: verbi gratia si coelibi vel Latino Juniano legatum fuerit, nec intra dies centum vel coelebs legi paruerit vel Latinus jus Quiritium consecutus sit: aut si ex parte heres scriptus vel legatarius ante apertas tabulas decesserit vel pereger factus sit, Ulpian, 17, 1. 'A vacant devise or bequest is one valid at civil law, but lapsed by some statute, such as a legacy to a celibate or Latinus Junianus, who fails within a hundred days to comply with the law, or acquire full citizenship; or a devise to a coheir, or bequest to a legatee who dies or becomes an alien before the will is opened.' [By the Civil law, unconditional devises and bequests vested (dies cedit) at the death of the testator (though still defeasible by the failure of the will); by the lex Papia Poppaea not before the opening of the will.]

The leges caducariae, which fixed the conditions of caducity, were aimed against the coelebs and the orbus. Coelebs is defined to be an unmarried man between the age of twenty and sixty, or an unmarried woman between the age of twenty and fifty. Orbus is a man between fifty and sixty without children, natural or adoptive.

A celibate could take nothing as heres extraneus or legatee; an orbus could only take half of the devise or bequest intended for him. The devises thus vacant were allotted by the leges caducariae in the first place to conjoint legatees of the same specific thing with children; in the second place to heirs with children; in the third place to other legatees with children; and in last remainder to the treasury (aerarium), 2 § 206. Caracalla, A.D. 212-217, made them lapse immediately to the treasury: Hodie ex constitutione impera-

toris Antonini omnia caduca fisco vindicantur, sed servato jure antiquo liberis et parentibus, Ulpian, 17, 2. 'At present by a constitution of Caracalla, all caducous devises are confiscated, saving the rights of ascendants and descendants.' From the rules of caducity ascendants and descendants of the testator to the third degree were excepted both by the lex Papia and by the constitution of Caracalla. Constantine, A.D. 320, abolished the pains and penalties of celibacy and childlessness, Cod. 8, 58, and Justinian formally and finally abrogated the leges caducariae.

By substitutions or alternative institutions testators were able to modify the course of accrual by Civil law (jus accrescendi), and what perhaps was still more interesting, to escape from the operation of the laws of caducity, by which sometimes a whole inheritance might fall into the clutches of the treasury.

DE LEGATIS.

§ 191. Post haec videamus de legatis. Quae pars iuris extra propositam quidem materiam videtur; nam loquimur de his iuris figuris quibus per universitatem res nobis adquiruntur. sed cum omnimodo de testamentis deque heredibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco poterat haec iuris materia tractari.

§ 191. Let us now examine legacies, a kind of title which seems foreign to the matter in hand, for we are expounding titles whereby aggregates of rights are acquired; but we had at any rate to treat of wills and heirs appointed by will, and it was natural in close connection therewith to consider this species of title [for a legacy is an accessory of a will].

§ 192. Legatorum utique genera *sunt* quattuor: aut enim per vindicationem legamus, aut per damnationem, aut sinendi modo, aut per praeceptionem.

§ 192. Legacies are of four kinds; by vindication, by condemnation, by permission, by preception.

§ 193. Per vindicationem *hoc modo legamus:* LUCIO TITIO verbi gratia HOMINEM STICHUM DO LEGO. sed *et* si *alterutrum* verbum positum sit, velut: *hominem Stichum do, per vin*dicationem legatum est. si *vero etiam aliis verbis velut* ita legatum fuerit: su*mito, vel ita: sibi habeto, vel* ita: CAPITO, aeque per vindicationem *legatum est.*

§ 193. A legacy by vindication is in the following form: 'To Lucius Titius I give and bequeath, say, my slave Stichus,' or only one word need be used as, 'I give my slave Stichus;' and other terms such as: 'Let him take,' 'Let him have,' 'Let him seize,' equally confer a legacy by vindication.

§ 194. *Ideo au*tem per vindicationem legat*um* a*ppellatur*, q*uia* pos*t* adi*t*am hereditatem statim ex iure Quiritium res legatarii fit; et

§ 194. It is so called, because immediately on the acceptance of the succession the thing becomes the Quiritarian property of the le-

si eam rem legatarius vel ab herede vel ab alio quocumque qui eam possidet petat, vindicare debet, id est intendere *eam rem suam* ex iure Quiritium esse.

§ 195. In eo *vero* dissentiunt prud*entes*, *quod Sabinus* quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post aditam hereditatem putant fi*e*ri legatarii, etiamsi ignoret sibi legatum esse dimissum, et postea quam scierit et *repudiaverit*, tum perinde esse atque si legatum non esset: Nerva vero et Proculus ceterique illius sc*h*olae auctores non alite*r* putant rem legatarii fieri, quam si voluerit eam ad se pertinere. Sed hodie ex divi Pii Antonini constitutione hoc magis iure uti videmur quod Proculo placuit. nam cum legatus fuisset Latinus p*er* vindicationem coloniae: deliberent, inqui*t*, decuriones an ad se velint pertinere, proinde ac si uni legatus esset.

§ 196. *Eae* autem solae res per vindicationem legantur recte quae ex iure Quiritium ipsius testatoris sunt. sed eas quidem *res* quae pondere, numero, mensura constant, placuit sufficere si mortis tempore sint ex iure Quiritium testatoris, veluti vinum, oleum, frumentum, pecuniam numeratam. ceteras res vero placuit utroque tempore testatoris ex iure Quiritium esse debere, id est et quo faceret *t*estamentum et quo moreretur: alioquin inutile est legatum.

§ 197. Sed sane hoc ita est iure civili. Postea vero auctore Nerone Caesare senatusconsultum factum est, quo cautum est, ut si eam rem quisque legaverit quae eius numquam fuerit, perinde utile sit lega-

gatee, and if he claims it from the heir or any other possessor, he ought to bring a real action, that is, declare himself proprietor thereof by law of the Quirites.

§ 195. However, there is a controversy on this matter between jurists, for, according to Sabinus and Cassius and the other authorities of my school, what is thus left becomes the property of the legatee immediately on the acceptance of the succession, even before he has notice of the legacy, and on notice and repudiation by the legatee, the legacy is cancelled. Nerva and Proculus and the jurists of that school make the passing of the property to the legatee depend on his accepting the legacy; and now a constitution of the late emperor Pius Antoninus seems to have established the doctrine of Proculus as the rule, for in the case of a Latinus Junianus bequeathed by vindication to a colony (juristic person), he said, 'The senate must deliberate whether they wish to become proprietors just as if the bequest was to a natural person.'

§ 196. Only those things are properly bequeathed by vindication which are the Quiritarian property of the testator; things, however, estimated by weight, number, or measure, need only be the Quiritarian property of the testator at the time of his death, for instance, wine, oil, corn, ready-money: other things are required to be the testator's Quiritarian property at both periods, both at the time of his death and at the time of making his will, or the legacy is void.

§ 197. However, this is only the civil law. In later times, on the proposition of Nero, a senatusconsult was passed, providing that if a testator bequeathed a thing which never belonged to him, the bequest

tum, atque si optimo iure relictum esset. optumum autem ius est per damnationem legatum; quo genere etiam aliena res legari potest, sicut inferius apparebit.

should be as valid as if it were made in the most favourable form; the most favourable form being by condemnation, whereby the property of another person may be bequeathed, as will presently appear.

§ 198. Sed si quis rem suam legaverit, deinde post testamentum factum eam alienaverit, plerique putant non solum iure civili inutile esse legatum, sed nec ex senatusconsulto confirmari. quod ideo dictum est, quia etsi per damnationem aliquis rem suam legaverit eamque postea alienaverit, plerique putant, licet ipso iure debeatur legatum, tamen legatarium petentem per exceptionem doli mali repel*l*i quasi contra voluntatem defuncti petat.

§ 198. If a man bequeath a thing belonging to him, and afterwards aliene it, most jurists agree that the bequest is not only avoided at civil law, but recovers no validity by the senatusconsult, because, even when a thing is bequeathed by condemnation and afterwards aliened, although the contention of a right by the suing legatee is valid, it is generally agreed that his claim is counterpoised by the plea of fraud, as contravening the testator's intention.

§ 199. Illud constat, si duobus pluribusve per vindicationem eadem res legata sit, sive coniunctim sive disiunctim, si omnes veniant ad legatum, partes ad singulos pertinere, et deficientis portionem collegatario adcrescere. coniunctim autem ita legatur: TITIO ET SEIO HOMINEM STICHUM DO LEGO; d*is*iunctim ita: LUCIO TITIO HOMINEM STICHUM DO LEGO. SEIO EUNDEM HOMINEM DO LEGO.

§ 199. It is a settled rule, that if the same thing be bequeathed by vindication to two or more persons, whether jointly or severally, and all claim the legacy, each is only entitled to a ratable part, and a lapsed portion accrues to the colegatees. A joint bequest is as follows: 'To Titius and Seius I give and bequeath my slave Stichus;' a several bequest as follows: 'To Lucius Titius I give and bequeath my slave Stichus. To Seius I give and bequeath the same slave.'

§ 200. Illu*d* quaeritur, quod sub condicione per vindicationem legatum est, pendente condicione cuius esset. Nostri praeceptores heredis esse putant exemplo statuliberi, id est eius servi qui testamento sub aliqua condicione liber esse iussus est, quem constat interea heredis servum esse. sed divers*ae* scholae auctores putant nullius interim eam rem esse; quod multo magis dicunt de eo quod sine condicione pure legatum est, antequam legatarius a*d*mittat legatum.

§ 200. When a condition is annexed to a bequest by vindication, it is a question who, pending the condition, is the owner: my school say, the heir, as in the case of the slave conditionally enfranchised by will, who is admittedly in the interim the property of the heir: the other school assert that there is no interim proprietor, and they insist still more strongly that this is so in the case of an unconditional simple bequest before the acceptance by the legatee.

§ 201. Per damnationem hoc modo legamus: HERES MEUS STICHUM SERVUM MEUM DARE DAMNAS

§ 201. A legacy by condemnation is in the following form: 'Be my heir condemned to give my

ESTO. sed et si DATO scriptum sit, per damnationem legatum est.

slave Stichus,' or simply, 'Let my heir give my slave Stichus.'

§ 202. *Quo* genere legati etiam aliena res legari potest, ita ut heres redimere et praestare aut aestimationem eius dare debeat.

§ 202. By this form a testator may bequeath a thing belonging to another person, binding the heir to purchase and deliver the specific thing, or pay its value.

§ 203. Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, velut fructus qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit.

§ 203. A thing which does not exist but will exist may be bequeathed by condemnation, as the produce of such and such land, or the child of such and such female slave.

§ 204. Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non ut per vindicationem legatum continuo legatario adquiritur, sed nihilominus heredis est, ideo legatarius in personam agere debet, id est intendere heredem sibi dare oportere: et tum heres *rem*, si mancipi sit, mancipio dare aut in iure cedere possessionemque tradere debet; si nec mancipi sit, sufficit si tradiderit. nam si mancipi rem tantum tradiderit, nec mancipaverit, usucapione *dumtaxat* pleno iure fit legatarii: *finitur* autem *usucapio ut supra quoque* diximus, mobilium quidem rerum anno, earum vero quae solo tenentur, biennio.

§ 204. Bequests in this form, even though no condition is annexed, unlike bequests by vindication, are not forthwith on the acceptance of the succession the property of the legatee, but continue the property of the heir, and the legatee must sue for them by personal action, that is, declare that the heir is bound to convey, and the heir, if the thing is mancipable, must convey it by mancipation or default in a fictitious vindication and livery of seisin; if not mancipable, by mere delivery of possession: for if a mancipable thing is merely delivered without mancipation, usucapion is required to give plenary dominion to the legatee, and usucapion, as before mentioned, in the case of movables requires a year's possession, in the case of immovables two years' possession.

§ 205. Est et *alia differentia inter legatum per vindicationem et per damnationem: si enim eadem res* duobus pluribusve per damnationem legata sit, si quidem coniunctim, plane singulis partes debentur *sicut in per vindicationem legato. si v*ero disiunctim, singulis solida res de*betur*, ut scilicet heres alteri rem, alteri aestimationem eius praestare debeat. et in coniunctis deficientis portio non ad collegatarium pertinet, sed in hereditate remanet.

§ 205. There is another difference between bequest by vindication and bequest by condemnation herein, that if the same thing is bequeathed to two or more by condemnation, if they are named jointly, each is entitled to a ratable part, as in legacy by vindication; if severally, each is entitled to the whole, and the heir is bound to convey the specific thing to one, and the value to the other; and in a joint bequest a lapsed portion does not

accrue to the colegatee, but belongs to the heir.

§ 206. Quod autem diximus deficientis portionem *in* per damnationem quidem legato in hereditate retineri, in per vindicationem vero collegatario accrescere, admonendi sumus ante legem Papiam iure civili ita fuisse: post legem vero Papiam deficientis portio caduca fit et ad eos pertinet qui in eo testamento liberos habent.

§ 206. The statement that a lapsed portion in legacy by condemnation falls to the heir, and in legacy by vindication accrues to the colegatee, be it observed, gives the rule of the civil law before the lex Papia; but since the lex Papia, a lapsed portion becomes caducous, and belongs to the devisees who have children.

§ 207. Et quamvis prima causa sit in caducis vindicandis heredum liberos habentium, deinde, si heredes liberos non habeant, legatariorum liberos habentium, tamen ipsa lege Papia significatur, ut collegatarius coniunctus, si liberos habeat, potior sit heredibus, etiamsi liberos habebunt.

§ 207. And although the first title to a caducous legacy is that of heirs with children, and the second, if the heirs are childless, of legatees with children, yet the lex Papia itself declares that in a joint bequest a legatee with children is to be preferred to heirs with children.

§ 208. Se*d* plerisque placuit, quantum ad hoc ius quod lege Papia coniunctis constituitur, nihil interesse utrum per vindicationem an per damnationem legatum sit.

§ 208. And it is generally agreed that as to the rights which the lex Papia gives to joint legatees, it makes no difference whether the bequest is by vindication or by condemnation.

§ 209. Sinendi modo ita legamus: HERES MEUS DAMNAS ESTO SINERE LUCIUM TITIUM HOMINEM STIC*H*UM SUMERE SIBIQUE HABERE.

§ 209. A bequest by permission is in the following form: 'Be my heir condemned to permit Lucius Titius to take and to have to himself my slave Stichus.'

§ 210. Quod genus legati plus quidem habet *quam per* vindicationem legatum, minus autem quam per damnationem. nam eo modo non solum suam rem testator utiliter legare potest, sed etiam heredis sui: cum alioquin per vindicationem nisi suam rem legare non potest; per damnationem autem cuiuslibet extranei rem legare potest.

§ 210. A bequest in this form has more latitude than one in the form of vindication, but less than one in the form of condemnation, for hereby not only can the testator's property be effectively bequeathed, but also that of the heir, whereas by the form of vindication the testator can only bequeath his own property, and by the form of condemnation he can bequeath the property of any stranger.

§ 211. Sed si quidem mortis testatoris tempore re*s* ipsius testatoris sit vel heredis, plane utile legatum est, etiamsi testamenti faciundi tempore neutrius fuerit.

§ 211. If at the time of the testator's death a thing belong to the testator or the heir, the bequest is valid, even though at the time of making the will it belonged to neither.

§ 212. Quodsi post mortem testatoris ea res heredis esse coeperit, quaeritur an utile sit legatum. et plerique putant inutile esse: quid ergo est? licet aliquis eam rem legaverit quae neque eius umquam fuerit, neque postea heredis eius umquam esse coeperit, ex senatusconsulto Neroniano proinde videtur ac si per damnationem relicta esset.

§ 213. Sicut autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque, donec is heres tradendo vel mancipando vel in iure cedendo legatarii eam fecerit; ita et in sinendi modo legato iuris est: et ideo huius quoque legati nomine in personam actio est QUIDQUID HEREDEM EX TESTAMENTO DARE FACERE OPORTET.

§ 214. Sunt tamen qui putant ex hoc legato non videri obligatum heredem, ut mancipet aut in iure cedat aut tradat, sed sufficere, ut legatarium rem sumere patiatur; quia nihil ultra ei testator imperavit, quam ut sinat, id est patiatur legatarium rem sibi habere.

§ 215. Maior illa dissensio in hoc legato intervenit, si eandem rem duobus pluribusve disiunctim legasti: quidam putant utrisque solidum deberi, sicut per *damna*tionem: nonnulli occupantis esse meliorem condicionem aestimant, quia cum in eo genere legati damnetur heres patientiam praestare, ut legatarius rem habeat, sequitur, ut si priori patientiam praestiterit, et is rem sumpserit, securus sit adversus eum qui postea legatum petierit, quia neque habet rem, ut patiatur eam ab eo sumi, neque dolo malo fecit quominus eam rem haberet.

§ 212. If it first belong to the heir after the death of the testator it is a question whether the bequest is valid, and it is generally held to be invalid. However, even though a thing bequeathed never belonged either to the testator or to the heir, by the senatusconsult of Nero all bequests are put on the same footing as a bequest by condemnation.

§ 213. Just as a thing bequeathed by condemnation does not immediately on the acceptance of the succession belong to the legatee, but continues to belong to the heir until by delivery, or mancipation, or default in a fictitious vindication, he makes it the property of the legatee; so it happens in bequest by permission, and accordingly this form of bequest is ground to support a personal action in the terms: 'Whatever the heir is bound by the will to convey or perform.'

§ 214. Although some hold that a bequest in this form does not bind the heir to mancipate or cede by fictitious action, or deliver, but is satisfied by the legatee being permitted to take the thing, as the testator only enjoined the heir to let him have it.

§ 215. A more serious question arises in another point respecting this form of bequest: if the same thing is bequeathed severally to two or more, some hold that each is entitled to the whole, as in bequest by condemnation; others hold that the first occupant is alone entitled, because as this form of bequest only condemns the heir to suffer the legatee to have the thing, as soon as the first occupant has been suffered to take it, the heir is safe against any subsequent claimant, as he neither has possession of the thing, so as to let it again be taken, nor has fraudulently parted with possession.

§ 216. Per praeceptionem hoc modo legamus: LUCIUS TITIUS HOMINEM STICHUM PRAECIPITO.

§ 216. A bequest by preception is in the following form: 'Let Lucius Titius take my slave Stichus by preception [before partition].'

§ 217. Sed nostri quidem praeceptores nulli alii eo modo legari posse putant, nisi ei qui aliqua ex parte heres scrip*t*us esse*t*: praecipere enim esse praecipuum sumere; quod tantum in eius personam procedit qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecip*uum* legatum habiturus sit.

§ 217. My school hold that such a bequest can only be made to one of several coheirs, because preception, or previous taking, can only be attributed to a person who, taking as heir, over and above his portion as heir, and before partition of the inheritance between the coheirs, takes something as legatee.

§ 218. Ideoque si extraneo legatum fuerit, inutile est legatum, adeo ut Sabinus existimaverit ne quidem ex *senatusconsulto* Neroniano posse convalescere: nam eo, inquit, senatusconsulto ea tantum confirmantur quae verborum vitio iure civili non valent, non quae propter ipsam personam legatarii non deberentur. sed Iuliano ex Sexto placuit etiam hoc casu ex senatusconsulto confirmari legatum: nam ex verbis etiam hoc casu accidere, ut iure civili inutile sit legatum, *i*nde manifestum es*se*, quod eidem aliis verbis recte legatur, velut [p*er* vindicationem et per damnationem], sinendi modo: tunc autem vitio personae legatum non valere, cum ei legatum sit cui nullo modo legari possit, velut peregrino cum quo testamenti factio non sit; quo plane casu senatusconsulto locus non est.

§ 218. Therefore, if a stranger have a legacy in this form it is void, and Sabinus held that the flaw is not remedied by the senatusconsult of Nero, for that senatusconsult only cures verbal flaws which make a bequest informal at civil law, not personal disabilities of the legatee. Julian, however, and Sextus held that this bequest also is made valid by the senatusconsult, as only being avoided at civil law by a verbal informality, as appears from the fact that the very same person might take by a bequest in another form, for instance, the form of permission, whereas personal disability of a legatee implies inability to take under any form, as that of an alien, who wants testamentifactio passiva, and is not relieved by the senatusconsult.

§ 219. Item nostri praeceptores quod ita legatum est nulla ratione putant posse consequi eum cui ita fuerit legatum, *praeter*qu*am* iudicio familiae erciscundae quod inter heredes de hereditate erciscunda, id est dividunda, accipi solet: officio enim iudicis id contineri, ut et quod per praeceptionem legatum est adiudicetur.

§ 219. Again, my school hold that in this form of bequest, the only action by which a legatee can recover is the action for partition of an inheritance, the judge's commission including a power of adjudicating a thing bequeathed by preception.

§ 220. Unde intellegimus nihil aliu*d* secundum nostrorum praeceptorum opinionem per praeceptionem

§ 220. From this it follows that, according to my school, nothing can be bequeathed by preception but

legari posse, nisi quod testatoris sit: nulla enim alia res quam hereditaria deducitur in hoc iudicium. itaque si non suam rem eo modo testator legaverit, iure quidem civili inutile erit legatum; sed ex *s*enatusconsulto confirmabitur. aliquo tamen casu etiam alienam rem *per* praeceptionem legari posse fatentur: veluti si quis eam rem legaverit quam creditori fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant soluta pecunia solvere eam rem, ut possit p*rae*cipere *is* cui ita legatum sit.

what belongs to the testator, for nothing but the inheritance forms the subject of this action. If, then, a thing that does not belong to the testator is bequeathed in this form, the bequest is void at civil law, but made valid by the senatusconsult. In one case they admit that another person's property may be bequeathed by preception, for instance, if a man bequeath a thing which he has conveyed by fiduciary mancipation to a mortgagee, as it is within the powers of the judge to order the coheirs to redeem the property by payment of the mortgage debt, and thus enable the legatee to exercise his right of preception.

§ 221. *S*ed dive*r*sae *sch*olae auctores putant etiam extraneo per praeceptionem legari posse proinde ac si ita scribatur: TITIUS HOMINEM STICHUM CAPITO, supervacuo adiecta PRAE syllaba; ideoque per *vindicationem eam rem* legatam videri. quae sententia dicitur divi Hadriani constitutione confirmata esse.

§ 221. The other school hold that a stranger may take a bequest in the form of preception just as if it were in the form: 'Let Titius take my slave Stichus,' the addition [by preception, or, before partition] being mere surplusage, and the bequest being in effect in the form of vindication; and this opinion is said to be confirmed by a constitution of the late emperor Hadrian.

§ 222. Secundum hanc igitur opinionem, si ea res *ex* iure Quiritium defuncti fuerit, po*test* a legatario vindicari, sive is unus ex heredibus sit sive extraneus: et si in bonis tantum testatoris fuerit, extraneo quidem ex senatusconsulto utile erit legatum, heredi vero familiae herciscundae iudicis officio praestabitur. quod si nullo iure fuerit testatoris, tam heredi quam extraneo ex senatusconsulto utile erit.

§ 222. According to this view, if the thing was the Quiritarian property of the defunct, it can be recovered in a real action by the legatee, whether an heir or a stranger, and if it was only the bonitarian property of the testator, a stranger will recover the bequest under the senatusconsult, an heir by the authority of the judge in an action for partition of inheritance. If it was in no sense the property of the testator, either an heir or a stranger may recover it under the senatusconsult.

§ 223. Sive tamen heredibus, secundum nostrorum opinionem, sive etiam extraneis, secundum illorum opinionem, duobus pluribusve eadem res coniunctim aut disiunctim legata fuerit, singul*i* partes ha*b*ere debent.

§ 223. Whether heirs, according to my school, or strangers, according to the other, if two or more legatees have the same thing bequeathed to them, each legatee is only entitled to a ratable portion.

§ 195. The testamentifactio passiva of municipalities, that is, their capacity as juristic persons to be made heirs or legatees, has already been noticed, p. 155.

§ 197. Senatusconsulto Neroniano cautum est ut quod minus pactis (aptis?) verbis legatum est perinde sit acsi optimo jure legatum esset: optimum autem jus legati per damnationem est, Ulpian, 24, 11. 'The senatusconsult of Nero provided that every inaptly worded bequest should be deemed to be expressed in the most favourable form: the most favourable form being by condemnation.'

By this senatusconsult, A.D. 64, the four forms of legacy are not entirely abolished, but the importance of their distinctions is very much diminished. A legacy, by whatever form bequeathed, is henceforth always recoverable, provided it could have been effectively bequeathed in any form.

Subsequently a constitution of Constantine, Constantinus, and Constans, A.D. 339, which, as we have already seen, abolished the necessity of sacramental terms in instituting an heir, dispensed with them also in the remaining testamentary dispositions: Et in postremis ergo judiciis ordinandis amota erit sollennium verborum necessitas, Cod. 6, 23, 15. In legatis vel fidei commissis necessaria non sit verborum observantia, ita ut nihil prorsus intersit, quis talem voluntatem verborum casus exceperit aut quis loquendi usus effuderit, Cod. 6, 37, 21. 'Legacies and trusts need no verbal formulas, and it is utterly immaterial, given the intention, in what grammatical form it is clothed, or in what idiom it is enounced:' apparently a part of the same constitution.

Three years afterwards, a constitution of Constantius and Constans abolished all legal formulas in the following terms: Juris formulae, aucupatione syllabarum insidiantes, cunctorum aetibus penitus amputentur, Cod. 2, 58, 1. 'Legal formulas, with snares in every syllable to make them treacherous, in every occasion are to be utterly abolished.'

Finally, Justinian enacted ut omnibus legatis una sit natura, Inst. 2, 20, 2, that all bequests should be of one nature; and allowed them to be recovered by personal or real action, at the option of the legatee; or, perhaps we should say, according to the exigencies of the case: for some subjects are essentially incapable of recovery by real action; e.g. if a determinate quantity of anything estimated by number, measure, or weight, were bequeathed by a

testator who had none in his possession at the time of his death, the heir would be bound to procure and convey it or its value to the legatee, but there would be no specific thing in existence which the legatee could recover by real action.

§ 207. The loss of the legacies which they otherwise would have acquired under the lex Papia, was one of the penalties whereby the legislator endeavoured to deter successors and legatees from undertaking secret trusts (fideicommissum tacitum) contrived for the purpose of evading some disqualification. In fraudem juris fidem accommodat, qui vel id quod relinquitur vel aliud tacite promittit restituturum se personae quae legibus ex testamento capere prohibetur, sive chirographum eo nomine dederit, sive nuda pollicitatione repromiserit, D. 34, 9, 10 (from a treatise of Gaius on the lex Julia et Papia. 'A devisee lends his honour to the evasion of the law when, without a direction on the face of the will, he engages to transfer a devise or other property to some person legally disqualified for taking under a will, whether the engagement be by formal written contract or by naked verbal promise.' In England secret trusts led to the passing of the statute of Uses and Trusts. At Rome secret trusts (on which Gaius wrote a treatise, D. 34, 9, 23) were discouraged by being made one of the cases of Ereption for unworthiness, § 151. Si quis in fraudem tacitam fidem accommodaverit, ut non capienti fideicommissum restituat, nec quadrantem eum deducere senatus censuit, nec caducum vindicare ex eo testamento si liberos habeat, Ulpian, 25, 17. 'An heir who lends his assistance to the evasion of the law by the acceptance of a secret trust in favour of a disqualified beneficiary loses by decree of the senate his right under the lex Falcidia to retain one fourth of his inheritance, and to claim the escheated legacies, to which by the lex Papia he would have been entitled as a father of children.'

§ 215. A passage in the Digest, 33, 2, 14, makes this depend on the intention of the testator.

§ 218. Juliano ex Sexto. If this is equivalent to Juliano libris ex Sexto, it would mean 'Julian in his abbreviation of Sextus Pomponius.' Von Savigny proposes Juliano et Sexto; Boecking, Juliano libro sexto Digestorum.

AD LEGEM FALCIDIAM.

§ 224. Sed olim quidem licebat totum patrimonium legatis atque

§ 224. By the ancient law a testator's whole estate, between lega-

libertatibus erogare, nec quicquam heredi relinquere praeterquam inane nomen heredis; *id*que lex XII tabularum permittere videbatur, qua cavetur, ut quod quisque de re sua testatus esset, id ratum haberetur, his verbis: UTI LEGASS*I*T SUAE RE*I*, ITA IUS ESTO. qua*r*e qui scripti heredes erant, ab hereditate se abstinebant; et idcirco plerique intestati moriebantur.

cies and enfranchisements, could be bequeathed away, and nothing left to the heir but an empty title; and this privilege seemed granted by the Twelve Tables, which concede an unlimited power of testamentary disposition, in these terms: 'A man's last directions respecting his property shall be enforced by the power of the state:' hence the persons who were appointed heirs declined to accept the inheritance, and people commonly died intestate.

§ 225. Itaque lata est lex Furia, qua, exceptis personis quibusdam, ceteris plus mille as*s*ibus legatorum nomine mortisve causa capere pe*r*missum non est. sed et haec lex non perfecit quod voluit. qui enim verbi gratia quinque milium aeris patrimonium habebat, poterat quinque hominibus singulis millenos asses legando totum patrimonium erogare.

§ 225. This led to the enactment of the lex Furia, whereby, excepting certain specified classes, a thousand asses was made the maximum that a legatee or donee in contemplation of death was permitted to take. This law, however, failed to accomplish its purpose, for a testator with an estate of, say, five thousand asses, might leave to five legatees a thousand asses apiece, and strip the heir of the whole.

§ 226. Ideo postea lata est lex Voconia, qua cautum est, ne cui plus legatorum nomine mortisve causa capere liceret quam heredes caperent. ex qua lege plane quidem aliquid utique heredes habere videbantur; se*d* tamen fere vitium simile nascebatur: nam in multas legatariorum personas distributo patrimonio potera*n*t adeo heredi minimum relinquere, ut non expediret heredi huius lucri gratia totius hereditatis onera sustinere.

§ 226. This occasioned the enactment of the lex Voconia, providing that no legatee or donee in contemplation of death should take more than the heir. By this law, some portion at all events was secured to the heir, but, like the former, it could be defeated, for the multitude of legatees between whom a man distributed his estate might leave so little to the heir as to make it not worth his while to undertake the whole burden of the succession.

§ 227. Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodra*n*tem. itaque necesse est, ut heres quartam partem hereditatis habeat. et hoc *nunc* iure utimur.

§ 227. At last, the lex Falcidia was enacted, prohibiting to bequeath away more than three fourths of an estate, in other words, securing for the heir one fourth of the inheritance, and this is the rule of law now in force.

§ 228. In libertatibus quoque dandis nimiam licentiam conpescuit lex Furia Caninia, sicut in primo commentario rettulimus.

§ 228. The enfranchisement of slaves was likewise kept within limits by the lex Furia Caninia, as mentioned in the first volume of these Institutions.

§ 224. A slightly different form of this celebrated ordinance is given by the Auctor ad Herennium: Paterfamilias uti super familia pecuniave sua legaverit ita jus esto, 1, 13, 23; also Cic. De Invent. 2, 50, 148.

§ 225. The lex Furia testamentaria, supposed to have been passed 183 B.C., although it imposed on the legatee who took more than a thousand asses a penalty of four times the amount of the excess, which was recoverable by manus injectio pura, 4 § 23, yet is instanced by Ulpian as a minus quam perfecta lex, because, though it imposed a penalty on the legatee, it did not invalidate the prohibited bequest. In a minus quam perfecta lex the legislator, instead of declaring invalid the disposition that he wished to discourage, or conferring on the person burdened by such disposition a counter right (exceptio) whereby he might defeat the claim of the person who sought to enforce such disposition, merely imposed on the creditor under such a disposition a penalty if he either enforced his claim by suit or if he even accepted voluntary payment from the person who stood in the relation of debtor. Minus quam perfecta lex est quae vetat aliquid fieri et si factum sit non rescindit sed poenam injungit ei qui contra legem fecit: qualis est lex Furia testamentaria quae plus quam mille assium legatum mortisve causa prohibet capere praeter exceptas personas, et adversus eum qui plus ceperit quadrupli poenam constituit, Ulpian, 1, 2. So the lex Furia de sponsu, 3 § 121, which perhaps was another clause of the enactment which contained the lex Furia testamentaria, imposed a penalty on the creditor who exacted more than a ratable portion of a guaranteed debt from a single sponsor, 4 § 22. By the lex Falcidia, on the contrary, a lex perfecta which superseded the lex Furia testamentaria, a legacy was absolutely null and void (ipso jure) beyond a certain extent and the heres as debtor could not be forced to pay more than the sum prescribed, a rule which may be expressed by the maxim, legata ipso jure minuuntur: and the Epistola Hadriani, 3 § 121, which similarly superseded the lex Furia de sponsu, conferred a counter right called Beneficium divisionis on the fidejussor or surety who was sued for more than a ratable portion of the debt, enabling him to defeat the valid claim of the creditor by the exceptio divisionis. Under the lex Furia testamentaria the heres could neither defend himself by alleging the absolute nullity of the excessive bequest (ipso jure) nor by alleging an opposing right

(exceptio) whereby the valid claim of the legatee might be counteracted. 4 § 115, com.

Assuming that the lex Furia de sponsu and the lex Furia testamentaria were two clauses of the same enactment, the lex Furia has had the singular destiny of having provoked by antagonism the introduction of two new institutions in Roman jurisprudence. The desire of evading its penalties relating to sponsio probably was the origin of fidejussio; and the desire of evading its penalties relating to legata was probably a principal stimulus to the invention of fideicommissa. Ihering.

The exceptae personae of the lex Furia testamentaria were the cognates of that ascendent by whom the testator, when filiusfamilias, had been emancipated, Ulpian, 28, 7.

§ 226. The lex Voconia, supposed to have been passed by the tribune Quintus Voconius Saxa, 169 B.C., contained a provision to the effect that a woman could not be instituted heiress to a classicus, or person scheduled in the first class of the census, i. e. registered as owner of property to the amount of a hundred thousand sesterces and upward, 2 § 274; and another, mentioned in the text, whereby the utmost amount that any one, male or female, could take as legatee, would be limited to half the value of the inheritance. This disposition of the lex Voconia was probably the origin of the form of legacy called partitio, 2 § 254, whereby a testator bequeathed as legacy an aliquot part of his inheritance. A testator with one heres would leave to a female legatee one half, with two heredes one third, of the inheritance, and so on, if he wished to leave her the utmost the law permitted.

The result of the lex Voconia, coupled with the rules of pretermission and intestacy, is the following: a daughter might take half her father's estate either as legatee (partiaria, 2 § 254) or, if pretermitted (praeterita), as heiress, 2 § 124. If she was filia unica, she might take the whole estate as heiress, if her father died intestate: but Romans were very averse to dying intestate; and in this event she would not have the free disposition of her property, as she would be the ward of her agnates.

§ 227. The terms of the principal clause of the lex Falcidia, passed B.C. 40, are given in the Digest: Quicunque civis Romanus post hanc legem rogatam testamentum faciet, is quantam cuique civi Romano pecuniam jure publico dare legare volet, jus potestasque esto, dum ita detur legatum, ne minus quam partem quartam

hereditatis ex eo testamento heredes capiant. Eis quibus quid ita datum legatumve erit, eam pecuniam sine fraude sua capere liceto, isque heres qui eam pecuniam dare jussus damnatus erit, eam pecuniam debeto dare quam damnatus est, Dig. 35, 2, 1, pr. 'Every Roman citizen who, after this law passes, makes a will, is entitled and empowered to give and bequeath whatever money to whatever citizen of Rome he desires in accordance with the laws of Rome, provided that such bequest leave at least one fourth of the inheritance to be taken under that will by the heirs. Such bequests the legatees are permitted to accept without penalty (an allusion to the penalty of the lex Furia), and the heir therewith charged is bound to pay.'

The words limiting the operation of the lex Falcidia to wills executed after the date of its enactment take this law out of the general rule respecting the temporal limits of the application of laws in the event of legislative innovations. The general rule for determining, on any change of the law, whether a given right is to be governed by the older or the newer law, is the principle that a new law has no retroactive influence on vested rights (acquired rights), but governs all that have yet to vest. Now under a will no one has vested rights, whatever his expectations, before the death of the testator. This date fixes the overture of the succession (vocatio heredis, delatio hereditatis), the vesting of the rights of the successor and also of the legatee (legatorum dies cedens, § 244), and determines the law by which they are governed. By the general rule, then, the lex Falcidia would have applied to all wills whose testators died after its enactment, at whatever date they were executed. The legislator wished to disarm the opposition of those who had made their wills by excepting them from its operation; though in many cases the lex Falcidia would be less rigorous than the lex Furia and lex Voconia, which it superseded, and testators would be glad to revise their testamentary dispositions. Savigny, System, § 394.

Some illustrations of the joint operation of the lex Falcidia and the Sc. Pegasianum, or rather the Sc. Trebellianum as modified by Justinian, will be presently given. § 259, comment.

DE INUTILITER RELICTIS LEGATIS.

§ 229. Ante *h*eredis institutionem *in*utiliter leatgur, scilicet quia testamenta vim ex institutione heredis

§ 229. A legacy bequeathed before a successor is appointed is void, because a will derives its operation

accipiunt, et ob id velut caput et fundamentum intellegitur totius testamenti heredis institutio.

from the appointment of a successor, and accordingly the appointment of a successor is deemed the beginning and foundation of a will.

§ 230. Pari ratio*ne* nec libertas ante heredis institutionem dari potest.

§ 230. For the same reason a slave cannot be enfranchised before a successor is appointed.

§ 231. Nostri praeceptores nec tutorem eo loco dari posse existimant: se*d* Labeo et Proculus tutorem posse dari, quod nihil ex hereditate erogatur tutoris datione.

§ 231. Nor, according to my school, can a guardian be nominated before an heir is appointed: according to Labeo and Proculus he may, because no part of the inheritance is bequeathed away by the nomination of a guardian.

§ 232. Post mortem quoque heredis inutiliter legatur; id est hoc modo: CUM HERES MEUS MORTUUS ERIT, DO LEGO, aut DATO. Ita autem recte legatur: CUM HERES MORI*E*TUR: quia non post mortem heredis relinquitur, sed ultimo vitae eius tempore. Rursum ita non potest legari: PRIDIE QUAM HERES MEUS MORIETUR. quod non pretiosa ratione receptum videtur.

§ 232. A bequest to take effect after the death of the heir is void, that is to say, if limited in the following terms: 'After my successor's death I give and dispose,' or, 'let my successor give.' The following limitation is valid: 'When my heir dies,' because the legacy is not to take effect after his death, but at the last moments of his life. A bequest to take effect on the day preceding the death of the successor is void. This distinction reposes on no valid reason.

§ 233. Eadem et de libertatibus dicta intellegemus.

§ 233. The same rules apply to enfranchisements.

§ 234. Tutor vero an post mortem heredis dari possit quaerentibus eadem forsita*n* poterit esse quaestio, quae de *eo* agitatur qui ante heredum institutionem datur.

§ 234. Whether a guardian can be nominated to begin his functions after the death of the heir, probably admits of the same divergence of opinion as whether he can be nominated before the appointment of the heir.

DE POENAE CAUSA RELICTIS LEGATIS.

§ 235. Poenae quoque nomine inutiliter legatur. poenae autem nomine legari videtur quod coercendi heredis causa relinquitur, quo magis heres aliqui*d* faciat aut non faciat; velut quod ita legatur: SI HERES MEUS FILIAM S*U*AM TITIO IN MATRIMONIUM COLLOCAVERIT, X *MILIA* SEIO DATO; vel ita: SI FILIAM TITIO IN MATRIMONIUM NON COLLOCAVERIS, X MILIA TITIO DATO.

§ 235. Penal bequests are void. A penal bequest is one intended to coerce the heir to some performance or forbearance. For instance, the following: 'If my heir give his daughter in marriage to Titius, let him pay ten thousand sesterces to Seius:' and the following: 'If thou do not give thy daughter in marriage to Titius, do thou pay ten thousand sesterces to Titius:' and the follow-

sed et [*si quis*] si heres verbi gratia intra biennium monumentum sibi non fecerit, x Titio dari iusserit, poenae nomine legatu*m est. et deni*que ex ipsa definitione multas similes species *pro*prias fingere possumus.

§ 236. Nec libertas quidem poe*nae* nomine dari potest; quamvis de ea re fuerit quaesitum.

§ 237. De tutore vero nihil possumus quaerere, quia non potest datione tutoris heres conpelli quidquam facere aut non facere; ideoque nec datur poenae no*mi*ne tutor; *et si* datus fuerit, magis sub condicione quam p*oe*nae nomine datus videbitur.

§ 238. Incertae personae legatum inutiliter relinquitur. incerta autem videtur persona quam per incertam opinionem animo suo testator subicit, v*elut si* ita legatum sit: QUI PRIMUS AD FUNUS MEUM VEN*E*RIT, *EI HERES* MEUS X *MILIA* DATO. idem iuris est, si generaliter omnibus legaverit: QUICUMQUE AD FUNUS MEUM VENERIT. i*n ea*dem causa est quod ita relinquitur: QUICUMQUE FILIO MEO IN MATRIMONIUM FILIAM SUAM CONLOCAVERIT, EI HERES MEUS X MILIA DATO. illu*d* quoque in eadem causa est quod ita relinquitur: QUI POST TESTAMENTUM CONSULES DESIGNATI ERUNT, aeque incertis personis legari videtur. et denique aliae multae huiusmodi species sunt. Sub certa vero demonstratione incertae personae recte legatur, velut: EX COGNATIS MEIS QUI NUNC SUNT QUI PRIMUS AD FUNUS MEUM VENERIT, EI X MILIA HERES MEUS DATO.

§ 239. Libertas quoque non videtur incertae personae dari posse, quia lex Furia Caninia iubet nominatim servos liberari.

§ 240. Tutor quoque certus dari debet.

ing: 'If my heir does not, say, within two years build me a monument, I order him to pay ten thousand sesterces to Titius;' all these are penal bequests, and many similar instances may be imagined in accordance with the definition.

§ 236. Freedom cannot be left as a penal bequest, although the point has been disputed.

§ 237. The nomination of a guardian cannot give rise to the question, because the nomination of a guardian cannot be a means of compelling an heir to any performance or forbearance, and a penal nomination of a guardian is inconceivable: if, however, a nomination were made with this design, it would be deemed rather conditional than penal.

§ 238. A bequest to an uncertain person is void. An uncertain person is one of whom the testator has no certain conception, as the legatee in the following bequest: 'Whoever comes first to my funeral, do thou, my heir, pay him ten thousand sesterces:' or a whole class thus defined: 'Whoever comes to my funeral:' or a person thus defined: 'Whoever gives his daughter in marriage to my son, do thou, my heir, pay him ten thousand sesterces:' or persons thus defined: 'Whoever after my will is made are the first consuls designate:' all these persons are uncertain, and many others that might be instanced. A bequest to an uncertain member of a certain class is valid, as the following: 'Of all my kindred now alive whoever first comes to my funeral, do thou, my heir, pay him ten thousand sesterces.'

§ 239. Freedom cannot be bequeathed to an uncertain person because the lex Furia Caninia requires slaves to be enfranchised by name.

§ 240. An uncertain person cannot be nominated guardian.

§ 241. Postumo quoque alieno inutiliter legatur. *est autem* alienus postumus, qui natus inter suos heredes testatori futurus non est. ideoque ex emancipato *quo*que filio conceptus nepos extraneus *est postumus avo; item qui in ute*ro est eius *quae conubio non interveniente ducta est* uxor, extraneus postumus patri contingit.

§ 242. Ac ne heres quidem potest institui postumus alienus: est enim incerta persona.

§ 243. Cetera vero qua*e* supra diximus ad legata proprie pertinent; quamquam non inmerito quibusdam placeat poenae nomine heredem institui non posse: nihil enim intererit, utrum legatum dare iubeatur heres, si fecerit aliquid aut non fecerit, an coheres ei adiciatur; quia tam *co*heredis adiectione quam legati datione conpellitur, ut aliquid contra propositum suum faciat.

§ 244. An ei qui in potestate sit eius quem heredem instituimus recte legemus, quaeritur. Servius recte legari probat, sed evanescere legatum, si quo tempore dies legatorum cedere solet, adhuc in potestate si*t*; ideoque sive pure legatum sit et vivo testatore in potestate heredis esse desierit, sive sub condicione et ante condicionem id acciderit, deberi legatum. Sabinus et Cassius sub condicione recte legari, pure non recte, putant: licet enim vivo testatore possit desinere in potestate heredis esse, ideo tamen inutile legatum intellegi oportere, quia quod nullas vires habiturum foret, si statim post testamentum factum decessisset testator, hoc ideo valere quia vitam longius traxerit, absurdum esse*t*. diversae scholae auctores nec sub condicione recte legari *putant*, quia quos in potestate habemus, eis non magis sub condicione quam pure debere possumus.

§ 241. An afterborn stranger cannot take a bequest: an afterborn stranger is one who on his birth will not be a self-successor to the testator: thus a grandson by an emancipated son is an afterborn stranger to his grandfather, and a child in the womb of one who is not a wife by civil wedlock is an afterborn stranger to his father.

§ 242. An afterborn stranger cannot even be appointed heir, because he is an uncertain person.

§ 243. Though what was said above of penal dispositions refers properly to bequests, yet a penal appointment of an heir is justly considered to be void, for it makes no difference whether a legacy is left away from an heir on his doing or failing to do something, or a coheir is appointed, as the addition of a coheir is just as effective a means of coercion to force an heir to take some step against his will.

§ 244. Whether a person in the power of an heir can be the donee of a legacy is a question. Servius holds that the bequest is valid, though it lapses if he continue under power at the date when the legacies vest; and whether the bequest is absolute and the legatee ceases to be subject to the power of the heir in the lifetime of the testator, or whether it is conditional and he is liberated before the condition is accomplished, in either case he holds the legatee entitled to the legacy. Sabinus and Cassius hold that a conditional bequest is valid, an absolute bequest invalid, because though the legatee may cease to be subject to the heir in the lifetime of the testator, yet the bequest must be deemed invalid because a disposition which would be void if the testator died immediately after making his will, cannot acquire validity by the mere prolongation

of his life. The other school of jurists hold that even a conditional bequest is invalid because a person under power is as incapable of conditional as of absolute rights against his superior.

§ 245. Ex diverso constat ab eo qui in potestate *tua* est, herede instituto, recte tibi legari: sed si tu per eum heres extiteris, evanescere legatum, quia ipse tibi legatum debere non possis; si vero filius emancipatus aut servus manumissus erit vel in alium translatus, et ipse heres extiterit aut alium fecerit, deberi legatum.

§ 245. Conversely it is certain that if a person in your power is appointed heir, he can be charged with payment of a legacy to you; though if you inherit by his means the legacy fails, because you cannot be bound to pay yourself; but if your son is emancipated, or your slave manumitted or aliened, and himself becomes successor or makes the alienee successor, you are entitled to the legacy.

§ 237. The rules requiring that bequests should follow the institution of the heir, and should be limited to take effect in the lifetime of the heir, and prohibiting penal bequests, were abolished by Justinian.

§ 238. Justinian abolished the rule prohibiting bequests to uncertain persons, Cod. 6, 48. Corporations or Universitates are certae personae, not incertae as we might imagine from their mention in this constitution. But though, as juristic persons, they were capable in general of property, yet originally, perhaps from a feeling of the impolicy of the principle of Mortmain, they were incapable of taking either hereditas or legatum. Leo, A.D. 469, had made municipalities capable of taking successions (hereditas), and probably by the constitutions of Nerva and Hadrian all juristic persons had become capable of taking bequests (legatum). By Justinian's constitution, Cod. 6, 48, other Universitates as well as Municipalities would become capable of taking successions. Savigny, § 85.

§ 242. Although an after-born stranger could not be appointed heir by the civil law, yet the praetor sustained such an appointment, and gave him the bonorum possessio. Justinian permitted him to take the legal estate, Inst. 3, 9, pr. After Justinian's legislation, Cod. 6, 48, all that remained of the once important disqualification of incerta persona was the rule, that a succession, testamentary or intestate, could not belong to a postumus alienus, unless he was begotten (conceptus) in the lifetime of the heritage-leaver. Vangerow, § 411, 429.

§ 244. Cedere diem significat incipere deberi pecuniam; venire diem significat eum diem venisse quo pecunia peti possit, Dig. 50, 16, 213. 'Cedit dies denotes the moment when a right to receive payment vests; venit dies denotes the moment when payment may be exacted.'

A right to a conditional legacy vested when the condition was accomplished. Herein a conditional legacy differs from a conditional contract. A fulfilled condition of a contract or promise is retracted to the date of the promise: i. e. the obligation of the promissor and the right of the promissee date from the conclusion of the contract as if it had been originally unconditional. Though an unconditional legacy was liable to be defeated by the heres declining the inheritance, or the will from any other cause failing of operation, yet, as soon as the validity of the will was ascertained by the aditio of the heres, the vesting of an unconditional legacy dated back from the death of the testator.

One of the Catos was the author of a maxim, that to test the validity of a legacy we must examine whether it would be valid if the testator died immediately after executing his will. This was called regula Catoniana, Dig. 34, 7, 1. The retroactive effect of the removal of an original impediment to the validity of a title is called the Convalescence of the title. Accordingly, Cato's rule may be described as a rule denying the Convalescence of legacies. Cato's rule, however, was only a criterion of the validity of unconditional bequests; the validity of conditional bequests can only be tested when the condition is accomplished. Accordingly, of the three opinions mentioned in this paragraph, that of Sabinus is to be regarded as sound, and is so treated by Justinian, Inst. 2, 20, 32.

DE FIDEICOMMISSARIIS HEREDITATIBUS.

§ 246. Hinc transeamus ad fideicommissa.

§ 247. Et prius de hereditatibus videamus.

§ 248. Inprimis igitur sciendum est opus esse, ut aliquis heres recto iure instituatur, eiusque fidei committatur, ut eam hereditatem alii restituat: alioquin inutile est testamentum in quo nemo recto iure heres instituitur.

§ 246. We now proceed to trusts.

§ 247. And to begin with trust successions:

§ 248. The first requisite is a legal successor in the first instance in trust to transfer the succession to another, for the will is void without a legal successor in the first instance.

§ 249. Verba autem utilia fideicommissorum haec recte maxime in usu esse videntur: PETO, ROGO, VOLO, FIDEICOMMITTO: quae proinde firma singula sunt, atque si omnia in unum congesta sint.

§ 249. The words properly and commonly used to create a trust are: 'I beg, I request, I wish, I intrust;' and they are just as binding separately as united.

§ 250. Cum igitur scri*p*serimus: *LUCIUS* TITIUS HERES ESTO, possumus adicere: ROGO TE, LUCI TITI, PETOQUE A TE, UT CUM PRIMUM POSSIS HEREDITATEM MEAM ADIRE, GAIO SEIO REDDAS RES*TI*TUAS. possumus autem et de parte restituenda rogare; et liberum est vel sub condicione vel pure relinquere fideicommissa, vel ex die certa.

§ 250. Accordingly, when we have written: 'Lucius Titius, be thou my heir,' we may add: 'I request and beg thee, Lucius Titius, as soon as thou canst accept my inheritance, to convey and transfer it to Gaius Seius;' or we may request him to transfer a part. So a trust may be either conditional or absolute, and to be performed either immediately or on a future day.

§ 251. Restituta autem hereditate is qui restituit nihilominus heres permanet; is vero qui recipit hereditatem, aliquando heredis loco est, aliquando legatarii.

§ 251. After the transfer of the inheritance the transferror continues heir, the transferree being sometimes quasi heir, sometimes quasi legatee.

§ 252. *Olim autem* nec heredis loco erat nec legatarii, sed potius emptoris. tunc enim in *u*su erat ei cui restituebatur hereditas nummo uno eam hereditatem dicis causa venire; et quae stipulationes inter *venditorem hereditatis et emptorem interponi solent, eaedem interponebantur inter* heredem et eum cui restituebatur hereditas, id est hoc modo: heres quidem stipulabatur ab eo cui restituebatur hereditas, ut quicquid hereditario nomine condemnatus fuisset, sive quid alias bona fide dedisse*t*, eo nomine inde*m*nis *es*set, et omnino si quis cum eo hereditario nomine ageret, u*t* recte defenderetur: ille vero qui recipiebat hereditatem invice*m* stipulabatur, ut si qui*d* ex hereditate ad heredem pervenisset, id sibi restitueretur; ut etiam pateretur eum hereditarias actiones procuratorio aut cognitorio nomine exequi.

§ 252. Formerly he became neither quasi heir nor quasi legatee but quasi purchaser. In those times it was customary for the transferree to pay a sesterce as fictitious purchaser of the inheritance, and the stipulations appropriate to a vendor and purchaser of an inheritance were entered into by the heir and transferree, that is to say, the heir stipulated from the transferree to be indemnified for any sums he should be condemned to pay or should in good faith pay on account of the inheritance, and to be adequately defended in any suit on account of the inheritance; and the transferree on the other hand stipulated to receive from the heir all profits arising from the inheritance and to be permitted to sue as cognitor or procurator of the heir.

§ 253. Sed posterioribus temporibus Trebellio Maximo et Annaeo Seneca Consulibus senatusconsultum factum est, quo cautum est, ut *s*i cui

§ 253. In more recent times, in the consulate of Trebellius Maximus and Annaeus Seneca, a senatusconsult was passed providing that,

hereditas ex fideicommissi causa restituta sit, actiones quae iure civili heredi et in heredem conpeterent *ei* et in eum darentur cui ex fideicommisso restituta esset hereditas. post quod senatusconsultum desierunt illae cautiones in usu haberi. Praetor enim utiles actiones ei et in eum qui recepit hereditatem, quasi heredi et in heredem dare coepit, *eae*que in edicto proponuntur.

§ 254. Sed rursus quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob id extinguebantur fideicommissa, Pegaso et Pusione *Consulibus* senatus censuit, ut ei qui rogatus esset hereditatem restituere perinde liceret quartam partem retinere, atque e lege Falcidia in legatis retinendi i*us* conceditur. ex singulis quoque rebus quae per fideicommissum relinquuntur eadem retentio permissa est. per quod senatusconsultum ipse onera hereditaria sustinet; ille autem qui ex fideicommisso reliquam partem hereditatis recipit, legatarii partiarii loco est, id est eius legatarii cui pars bonorum legatur. quae species legati partitio vocatur, quia cum herede legatarius partitur hereditatem. unde effectum est, ut quae solent stipulationes inter heredem et partiarium legatarium interponi, ea*e*dem interponantur inter eum qui ex fideicommissi causa recipi*t* hereditatem et heredem, id est ut et lucrum et damnum hereditarium pro rata parte inter eos commune sit.

§ 255. Ergo si quidem non plus qua*m* dodrantem hereditatis scriptus heres rogatus sit restituere, tum ex Trebelliano senatusconsulto restituitur hereditas, et in utrumque actiones hereditariae pro rata parte

when an inheritance is transferred in pursuance of a trust, the actions which the civil law allows to be brought by the heir or against the heir shall be maintainable by the transferree and against the transferree. Henceforth the old covenants were discontinued, and the Praetor used to give to and against the transferree as quasi heir the indirect [4 § 34] or fictitious actions which are formulated in the album.

§ 254. However, as heirs, when made trustees to transfer the whole or nearly the whole of a succession, declined for a small benefice or no benefice to accept the succession, and this caused a failure of the trusts, the senate in the consulship of Pegasus and Pusio decreed, that a devisee in trust to transfer a succession should have the same right to retain a fourth of the succession as the lex Falcidia gives to an heir charged with the payment of legacies; and gave a similar right of retaining the fourth of any specific thing left in trust. When this senatusconsult comes into operation, the heir is sole administrator and the transferree of the residue is on the footing of a partiary legatee, that is, of a legatee of a certain part of the estate under the kind of legacy called participation. Accordingly the stipulations appropriate between an heir and partiary legatee are entered into by the heir and transferree, in order to secure a ratable division of the gains and losses arising out of the succession.

§ 255. But if no more than three fourths of the inheritance is in trust to be transferred, then the Sc. Trebellianum governs the transfer, and both are liable to be sued for the debts of the inheritance in ratable

dantur: in heredem quidem iure civili, in eum vero qui recipit hereditatem ex senatusconsulto Trebelliano. quamquam heres etiam pro ea parte quam restituit heres permanet, eique et in eum solidae actiones competunt: sed non ulterius oneratur, nec ulterius illi dantur actiones, quam apud eum commodum hereditatis remanet.

portions, the heir by civil law, the transferree by the Sc. Trebellianum: for though the heir even as to the transferred portion continues heir, and can sue or be sued for the totality of a debt, in practice the praetor only allows him to sue or be sued in the proportion of his beneficial interest in the inheritance.

§ 256. At si quis plus quam dodrantem vel etiam totam hereditatem restituere rogatus sit, locus est Pegasiano senatusconsulto.

§ 256. If more than three fourths or the whole is devised in trust to be transferred, the Sc. Pegasianum comes into operation.

§ 257. Se*d* is qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinuerit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinet: se*d* quarta quidem retenta quasi partis et pro parte stipulationes interponi debent tamquam inter partiarium legatarium et heredem: si vero totam hereditatem restituerit, ad exemplum emptae et venditae hereditatis stipulationes interponendae sunt.

§ 257. And when once the heir has accepted, that is to say, voluntarily, whether he retains one fourth or declines to retain it, he is sole administrator: but, if he retains a fourth, he should covenant with the transferree as quasi partiary legatee; if he transfers the whole, he should covenant with him as quasi vendee.

§ 258. Se*d* si recuset scriptus heres adire hereditatem, ob id quod dicat eam sibi suspectam esse quasi damnosam, cavetur *Peg*asiano senatusconsulto, ut desiderante eo cui restituere rogatus est, iussu Praetoris adeat et restituat, perindeque ei et in eum qui receperit actiones dentur, ac iuris est ex senatusconsulto Trebelliano. quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur, et actiones hereditariae ei et in eum transferuntur qui receperit hereditatem.

§ 258. If an heir refuse to accept a succession from a suspicion that the liabilities exceed the assets, it is provided by the Sc. Pegasianum, that on the request of the transferree he shall be ordered by the Praetor to accept and transfer; whereupon the transferree shall be just as capable of suing and being sued as the transferree under the Sc. Trebellianum. In this case no stipulations are necessary, because the transferror is protected, and the hereditary actions pass to and against the transferree.

§ 259. Nihil autem interest utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogetur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogetur: nam et hoc casu de quarta parte eius partis ratio ex Pegasi*a*no senatusconsulto haberi solet.

§ 259. It makes no difference whether a sole heir or a part heir is under a trust to transfer, for a part heir is entitled under the Sc. Pegasianum to retain a fourth of his part.

§ 246. The dispositions of a testator which have been hitherto considered were directions addressed to his successor, resembling the orders of a father to his son or of a master to his slave, or the commands of a magistrate to his subordinate or of the state to its members. Hence the importance of the regular institution of a successor, of finding a person who, being a mere creature of the testator's, shall be compelled to execute his commands.

Fideicommissa, to which we now proceed, are not commands, but requests. Legatum est quod legis modo, id est, imperative, testamento relinquitur, nam ea quae precativo modo relinquuntur fideicommissa vocantur, Ulpian, 24, 1. 'A legacy is a legislative or imperative testamentary disposition: a precative disposition (a disposition in the form of entreaty) is a trust.'

The original object of trusts was to extend the testator's bounty to those who were legally incapacitated to be legatees; for instance, aliens and Latini Juniani; for though Hadrian subsequently incapacitated aliens for taking the benefit of a trust, yet, as declarations of trust were exempt from many other restrictions which hampered direct devises, they survived the circumstance which was the principal motive of their introduction. For instance, another object of the declaration of trusts was to avoid the restrictions imposed by the lex Falcidia on the amount of legacies bequeathable to legatees who were capable of taking (had capacitas as well as testamentifactio passiva), and this object would continue to operate as a motive for the employment of trusts even after the invalidation of trusts in favour of Latini Juniani.

That trusts had originally no legal validity, we see from Cicero, Verres, 2, 1, 47, where we learn that it was usual for the testator to make the successor take an oath to perform the testator's wishes, thus supplying by religious motives the want of a political sanction. But Augustus, as we are informed by Justinian, in some individual cases of breach of trust directed the consuls to interpose their authority and compel trustees to execute their charge; and trusts soon became an ordinary mode of testamentary disposition, and, in process of time, a permanent fiduciary jurisdiction was established, the court of the praetor fideicommissarius.

Originally if a testator wished to leave to a certain person the net amount of his fortunes, unsaddled with the burden of administration, he instituted another as heres, whose sole function was the satisfaction of creditors and the discharge of the other duties of

administration: and bequeathed the net residue of his patrimony to the real object of his bounty as legatee (legatarius). When this course was restricted by the lex Falcidia, a testator who wished a certain donee to receive the whole of his patrimony free from burdens would institute another person as heres, subject to a trust to transfer the whole of the inheritance, after payment of debts and with some remuneration for his trouble, to the beneficiary donee (fideicommissarius). At first the testator could only rely on the honour of the heres, for these trusts were not legally binding; and not long after they became legally binding they were subjected by Sc. Pegasianum to the same restrictions as were imposed on legacies. Thus the advantage of having a disinterested Executor, of leaving the testator's wishes to be carried into effect by a person not, like the successor or legatee, interested in delayed or inequitable distribution; an advantage which an English testator may, if he chooses, secure, was deliberately sacrificed by the Roman legislator.

Another method of leaving to a person the net value of an inheritance without the troubles of administration, viz, the institution of the slave of the devisee, has already been noticed.

The conversion of a moral into a political obligation by the legalization of trusts, was similar to what occurred when the Twelve Tables gave legal force to the nuncupation declaring the conditions and purposes of a mancipation; and, remembering the celebrated ordinance, Cum nexum faxit mancipiumque, uti lingua nuncupassit, ita jus esto, it may occur to us to wonder why Augustus did not imitate the energetic brevity of the ancient legislator, and simply enact, Cum testamentum faxit codicillosve, uti fideicommiserit, ita jus esto. There would then have been no need of the cumbrous machinery of fictitious sales and stipulations between quasi vendor and quasi vendee; but a little reflection will show that such an enactment would have operated very inconveniently, and have defeated the very purposes for which trusts were instituted. Such an enactment would have made trusts, like nuncupations, a matter of civil law; and the jus strictum of the civil law was far from elastic or rational even in the time of Augustus; so that, if it was intended to enlarge the powers of testators and the discretion of the fiduciary tribunal, it was absolutely necessary to make trusts a province not of legal but of equitable jurisdiction.

§ 251. The transferree, it will be seen, was quasi heir when the Sc. Trebellianum applied: when the Sc. Pegasianum applied he was either quasi legatee or quasi vendee.

§ 253. The terms of the Sc. Trebellianum, passed in the reign of Nero, A.D. 62, are given in the Digest: Quum esset aequissimum in omnibus fideicommissariis hereditatibus, si qua de his bonis judicia penderent, ex his eos subire, in quos jus fructusque transferretur, potius quam cuique periculosam esse fidem suam; placuit et actiones, quae in heredes heredibusque dari solent, eas neque in eos neque his dari, qui fidei suae commissum, sicuti rogati essent, restituissent, sed his et in eos quibus ex testamento fideicommissum restitutum fuisset, quo magis in reliquum confirmentur supremae defunctorum voluntates, Dig. 31, 1, 2. 'Forasmuch as equity requires that whenever a succession is devised in trust, any actions arising thereout should be brought against the transferree of the succession and its benefits, and that the devisee should incur no risk in consequence of his trust; it is decreed that the actions of and against an heir, shall not be granted to or against an heir who transfers a succession in pursuance of a trust, but to and against the testamentary transferree, in order that in future the last wishes of testators may have more effect.'

§ 254. By the Sc. Trebellianum, if the whole beneficial interest in an inheritance was transferred, the whole right of suing and being sued passed to the transferree: if only a portion of the beneficial interest was transferred, both the transferror and the transferree could sue and be sued in the same proportion. The Sc. Pegasianum, passed in the reign of Vespasian, A.D. 70–76, apparently provided that when less than a fourth of the inheritance is left to the benefit of the heir, the Sc. Trebellianum should be inoperative, that is to say, that in such a case the actions by or against the inheritance shall not be maintainable by or against both the heir and transferree in the proportion of their interests, but should be exclusively maintainable by or against the heir. In fact, having subjected the transferree to the liability of abatement which the lex Falcidia imposed on the legatee, it seemed logical to put him in all other respects on the footing of a legatee, including the immunity from being sued and incapacity of suing for the debts of the succession. Having thus made the heir sole administrator, in order to secure a just and ratable division of the gains and losses of administration, the Sc. Pegasianum directed the heir and transferree

to enter into the covenants usual between an heir and a partiary legatee. A partiary legatee is a legatee by partition, which Theophilus calls a fifth form of legacy, and of which Ulpian gives the formula: Sicut singulae res legari possunt, ita universarum quoque summa legari potest, ut puta hoc modo: Heres meus cum Titio hereditatem meam partito dividito, quo casu dimidia pars bonorum legata videtur: potest autem et alia pars veluti tertia vel quarta legari: quae species partitio appellatur, Ulpian, 24, 25. 'As single things can be bequeathed, so can a universality, for instance thus: Do thou, my heir, partition and divide my inheritance with Titius; in which case a moiety is deemed to be bequeathed, but any other part, a third or fourth, may be bequeathed, and this form of bequest is called partition.' This form of legacy probably owed its origin to the lex Voconia, § 226.

§ 257. It is therefore not true, as might be inferred from § 254, that the stipulations between quasi vendor and quasi vendee were entirely discontinued. The reason why these obsolete covenants again became necessary is probably because the Sc. Pegasianum, having abrogated the Sc. Trebellianum in all cases where less than a fourth of the inheritance is left to the heir, had omitted to declare what mutual securities were proper to be taken by the heir and transferree, in case the heir declined to avail himself of his right to retain a fourth.

Modestinus suggested another course. He held that if the heir declined to avail himself of his right, and transferred the whole inheritance, there was no need of any stipulations, as the Sc. Trebellianum would then apply. However he thought the point doubtful, for he recommended that the heir should feign unwillingness to accept a damnosa hereditas, and should make a compulsory acceptance by the order of the praetor, in which case the actions are transferred in totality to the transferree by the express provision of the Sc. Pegasianum, Dig. 36, 1, 45. The sequence of §§ 257, 258 seems to indicate an intention of Gaius to suggest that this course might be adopted.

§ 258. The requirement for form's sake of a compulsory aditio and restitutio, instead of making the hereditas vest immediately under the will in the fideicommissarius (the course pursued by the legislator in the English statute of Uses and Trusts), has already 1 § 190, been noticed as characteristic of Roman jurisprudence. It had this inconvenience, that it permitted the trusts to be defeated

by the death or absence, malicious (dolo malo) or involuntary, of the heres or fiduciarius. No remedy was provided for this contingency till the time of Justinian, who enacted that in such a case the inheritance should vest in the fideicommissarius by mere operation of law (ipso jure) by means of a fiction of aditio and restitutio, a fiction introduced, as evidenced by the term actio utilis, into the remedy of the cestui que trust. Sancimus itaque ut sive per contumaciam abfuerit is cui restitutio imposita est, sive morte praeventus nullo relicto successore fuerit, sive a primo fideicommissario in secundum translatio celebrari jussa est, ipso jure utiles actiones transferantur, Cod. 6, 49, 7. 'Be it enacted, that on the contumacious absence or death unsucceeded of a fiduciarius or of a first fideicommissarius charged in favour of a second, the law itself operate a transfer of fictitious actions from such persons to the cestui que trust.'

§ 259. The stipulations of the transferree as quasi vendee or quasi partiary legatee introduced by the Sc. Pegasianum were not only a cumbrous machinery, but after all afforded an insufficient security to the parties. The heir and transferree were always in mutual danger of one another's insolvency, and an heir after transferring the whole inheritance, though not fairly liable to any molestation or vexation on account of it, might find himself with two lawsuits on his hands: he might first be sued by the creditors of the estate, and then have to recover back what he is condemned to pay them from the transferree by suing him on the covenants of quasi vendor and quasi vendee.

It is not surprising, therefore, that Justinian abolished these provisions of the Sc. Pegasianum, and enacted that in every case there shall be a transfer or division of actions as contemplated by the Sc. Trebellianum, i.e. that the actions by or against the inheritance shall either be transferred in totality to the transferree, or be maintainable by or against both the heir and the transferree in the proportion of their interests.

The following observations may serve to complete the explanation of the Sc. Trebellianum and the Sc. Pegasianum.

Succession is the transfer of a right from one person (auctor) to another person (successor), such as occurs, for instance, in the voluntary alienation of property. Here the same dominion that was previously exercised by the alienor is subsequently exercised by the alienee. The right continues the same; the person invested there-

with is changed. It was characteristic of jus in personam or obligation (before, at least, the invention of papers payable to the holder and transferable by delivery) that it was not capable of a similar alienation. All that could be done to accomplish a similar result was to employ one of two cumbrous processes, Novation or Cession of Action (Procuration), 2 § 38. In these procedures there is no Succession, for in Novation the transferree is not invested with the same right that previously vested in the transferror, but a new right is created in the transferree while the old right of the transferror is extinguished: and in Procuration or Cession the right still continues vested in the transferror, who allows the transferree to recover it or enforce it by action and retain the fruits of the recovery.

This inalienability of obligations, however, was confined to SINGULAR successions (in singularum rerum dominium successio). UNIVERSAL succession (per universitatem successio) or the transmission of the ideal whole of a patrimony, of which we have an example in hereditas testamentary or intestate, differed from SINGULAR succession by the capacity of passing obligation as well as Dominion. The heres of the testator or intestate sued and was sued in his own name on the obligations, active or passive, that originally vested in the deceased. But UNIVERSAL succession was an institution only recognised by Roman jurisprudence in certain definite cases. It was a formidable operation and rigorously circumscribed. It was not a transaction that the law allowed to be accomplished at the discretion of individual parties in pursuance of private convention. It was only admitted in the cases enumerated by Gaius, 2 § 98, and, without legislative interference, the list could not be augmented.

These difficulties in the transfer of obligation opposed a great obstacle to the transfer (restitutio) of trust successions: and these difficulties were partially removed by the Sc. Trebellianum and Sc. Pegasianum, and more completely by Justinian, by investing the Restitutio with the character of successio per universitatem, in other words, by the legislative sanction of a new instance of UNIVERSAL succession.

The following observations may illustrate the joint operation of the laws concerning Trusts and the lex Falcidia. Although the cestui que trust (fideicommissarius) or person to whom an inheritance or a portion thereof is directed to be transferred (restitui)

is charged like a coheres with the legacies in proportion to the quota which he takes, he has not like the heres a right of deducting from the legacies with which he is charged, and retaining for himself a Falcidian portion or fourth of his quota. His rights against the legatee depend on the question whether the testator in directing the transfer, or in other words creating the trust, used the terms deductis legatis, 'after deduction of legacies,' a clause favouring the legatees; or whether, in giving the legacies, he used terms charging them on the inheritance (si ad heredis onus esse testator legata dixerit); which would imply that the cestui que trust was to be exactly assimilated to the legatees. Where no terms are expressed, the clause, deductis legatis, is presumed. The following examples will illustrate the working of the law.

(1) A testator owning 400 (sestertia, or any other units) leaves all to A as his sole successor, but directs him as trustee (fiduciarius) to convey half the inheritance to B (fideicommissarius), and leaves a legacy of 200 to C. The effect is that C receives 100 from A and 100 from B. D. 36, 1, 1, 20.

But suppose the testator left a legacy of 400 to C. Then C will receive 200 from B who has no right of retaining anything, and 100 from A, who is entitled to retain for himself one fourth of his inheritance, i. e. the 100 that remain.

(2) If an heir is charged to transfer the whole of an inheritance and the legacies are added to his charge (si ad heredis onus esse testator legata dixerit), the interests of both the legatee and transferree undergo, if necessary, a proportional reduction. For instance a testator, proprietor of 400, makes A his sole successor, but requests him to transfer the whole succession to B, and gives a legacy of 300 to C, making use of the above-mentioned terms. The result is that A, the heir, retains 100 as his Falcidian fourth, and the remaining 300 are distributed between B the cestui que trust and C the legatee in the proportion of 4 to 3; that is to say, the cestui que trusts takes $\frac{4}{7}$ or $171\frac{3}{7}$, and the legatee takes $\frac{3}{7}$ or $128\frac{4}{7}$. Dig. 36, 1, 3, pr.

(3) If the testator directs the heir to transfer the whole of the inheritance 'after deduction of the legacies' (deductis legatis), the transferree bears the whole burden of the legacies, and only keeps what remains after full payment of the legatee, subject to this proviso, that, though a transferree is generally not entitled to a Falcidian fourth, yet if a transferree who has to bear the burden

of legacies receives the inheritance reduced by the Falcidian fourth of the heres, he is himself entitled to reduce proportionally the legacies and retain a fourth thereof for himself. Dig. 35, 1, 43, 3. Dig. 35, 2, 32, 4. E. g. a testator, proprietor of 400, makes A his sole successor, requesting him to transfer the whole to B after deduction of legacies, and leaves a legacy of 300 to C. The result is that the heir retains $\frac{1}{4}$ (100); and the remaining 300 is distributed between the legatee and transferree, the legatee taking 300 reduced by $\frac{1}{4}$ (225), and the transferree taking that $\frac{1}{4}$ (75). The same effect would have been produced if the testator, instead of using the clause deductis legatis, had simply charged the legacies on the cestui que trust. Or the rights of the cestui que trust may be calculated with the same result by the following method. The heres retains $\frac{1}{4}$ and transfers $\frac{3}{4}$ to the cestui que trust, who under Justinian's legislation is no longer a partiary legatee as he was under the Sc. Pegasianum, but a coheres with the heres in the proportion of $\frac{3}{4}$ to $\frac{1}{4}$. The legatee is entitled to 300 from these coheirs in the proportion of their shares of the succession. The heres, however, is protected by the lex Falcidia, and thus $\frac{1}{4}$ of the legacy is lost to the legatee: he obtains however $\frac{3}{4}$ (225) from the transferree, who retains for himself the remaining $\frac{1}{4}$ (75).

(4) If the heres makes voluntary aditio, but does not retain the Falcidian fourth to which he is entitled, then, if the legacy was charged on the inheritance, the whole inheritance is divided between the transferree and legatee in the proportion of 4 to 3: that is, the transferree obtains altogether $228\frac{4}{7}$ and the legatee $171\frac{3}{7}$.

(5) If the legacy was expressly charged on the fideicommissarius, or if there was no express clause defining whether it was charged on him and on the heres, then the legatee will in the first instance benefit by the heres abstaining from his fourth: and the transferree will only get what remains after full payment of the legacy. Thus, in the circumstances we have assumed, the legatee will get 300 and the transferree 100.

(6) If the heres abstains from his $\frac{1}{4}$ expressly in favour of the transferree, the latter alone gains the portion of the heres, Dig. 36, 1, 1, 19.

(7) If the heres only makes compulsory aditio, the legatee takes no share of the Falcidian fourth, which all goes to the transferree who compelled the heres to make aditio. Dig. 36, 1, 2.

(8) If the heres has to transfer the whole but has received his Falcidian fourth in the shape of legacies, the transferree has to satisfy the legatees: and if he cannot pay the whole of their legacies they may recover from the heres all that he receives beyond his fourth.

(9) If the heir is directed to transfer not the whole but $\frac{3}{4}$ of the inheritance, the transferree has to satisfy the legatees, but deducts and retains for himself $\frac{1}{4}$ of their legacies, as he would under the circumstances supposed in No. 3. Vangerow, § 559.

DE SINGULIS REBUS PER FIDEICOMMISSUM RELICTIS.

§ 260. Potest autem quisque etiam res singulas per fideicommissum relinquere, velut fundum, hominem, ves*tem*, argentum, pecuniam; et vel ipsum heredem rogare, ut alicui restituat, vel legatarium, quamvis a legatario legari non possit.

§ 260. Not only aggregates of right, but single rights, may be left in trust, as property in land, in a slave, in a garment, in plate, in money; and the trust may be imposed either on an heir or on a legatee, although a legatee cannot be charged with a legacy.

§ 261. Item potest non solum propria testatoris res per fideicommissum relinqui, sed etiam heredis aut legatarii aut cuiuslibet alterius. itaque et legatarius non solum de ea re rogari potest, ut eam alicui restituat, quae ei legata sit, sed etiam de alia, sive ipsius legatarii sive aliena sit. sed hoc solum observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento cep*er*it: nam quod amplius est inutiliter relinquitur.

§ 261. Not only the testator's property, but that of an heir, or legatee, or stranger, may be left in trust. Thus a legatee may be charged with a trust to transfer either a thing bequeathed to him, or any other thing belonging to himself or to a stranger; provided always that he is not charged with a trust to transfer more than he takes under the will, for in respect of such excess the trust would be void.

§ 262. Cum autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est, aut ips*a*m redimere et praestare, aut aestimationem *eius* solvere. *sicut* iuris *est*, *si* per damnationem aliena res legata sit. sunt tamen qui putant, si rem per fideicommissum relictam dominus non vendat, extingui fideicommissum: sed aliam esse causam per damnationem legati.

§ 262. When a stranger's property is left by trust, the trustee must either procure and convey the specific thing or pay its valuation, like an heir charged under a bequest by condemnation; though some hold that the owner's refusal to sell avoids a trust to convey while it does not avoid a bequest by condemnation.

§ 263. Libertas quoque servo per fideicommissum dari potest, ut vel heres rogetur manumittere, vel legatarius.

§ 263. Liberty can be left to a slave by a trust charging either an heir or a legatee with his manumission.

§ 264. Nec *interest utrum de suo proprio servo testator* roget, an de eo qui ipsius heredis *aut legat*arii vel etiam extranei sit.

§ 265. Itaque et alienus ser*vus* redimi et manumitti debet. quod *si dominus eum non ven*dat, sane *extinguitur libertas, quia pro libertate pret*ii computatio nulla intervenit.

§ 266. Qui autem ex fideicommisso manumittitur, non testatoris fit *libertus, etiamsi te*statoris *servus sit, sed eius qui manumit*tit.

§ 267. At qui directo, testamento, liber esse iubetur, *vel*ut hoc *modo*: STICHUS SERVUS MEUS LIBER ESTO, *vel* STICHUM SERVUM MEUM LIBERUM ESSE IUBEO, *is ipsius testa*toris fit libertus. Nec alius ullus directo, ex testamento, libertatem habere potest, quam qui utroque tempore testatoris *ex iure Quiritium fuerit, et quo faceret* testamentum et quo moreretur.

§ 268. Multum autem diff*erunt* quae per fideicommissum rel*inquun*tur ab his qu*ae* directo iure legantur.

§ 269. Nam ecce per fideicommissum e*tiam nutu* heredi*tas* relinqui potest: cum alioquin legatum nisi testamento fa*cto* inutile sit.

§ 270. Item intestat*us* moriturus potest ab eo ad quem bona eius pertinent f*ideicommissum* alicui relinquere: cum alioquin ab eo legari non possit.

§ 270 *a*. *Item legatum codicillis* relic*tum* non aliter valet, quam si a testatore confirmati fuerint, id est nisi in testamento cave*rit* testator, ut quidquid in codicillis scripserit id ratum sit: fideicommissum vero etiam non confirmatis codicillis relinqui potest.

§ 271. Item a legatario legari non potest: sed fideicommissum relinqui potest. quin etiam ab eo quoque cui per fideicommissum relinquimus

§ 264. And it makes no difference whether the slave is the property of the testator, of the heir, of the legatee, or of a stranger.

§ 265. A stranger's slave, therefore, must be purchased and manumitted, but his owner's refusal to sell extinguishes the gift of liberty, because liberty admits of no pecuniary compensation.

§ 266. A trust of manumission makes the slave the freedman, not of the testator, though he may have been the owner of the slave, but of the manumitter.

§ 267. A direct bequest of liberty, such as: 'Be my slave Stichus free,' or, 'I order that my slave Stichus be free,' makes the slave the freedman of the testator. A direct bequest of liberty can only be made to a slave who is the testator's quiritarian property at both periods, both at the time of making his will and at the time of his decease.

§ 268. There are many differences between fiduciary devises and direct bequests.

§ 269. In a fiduciary devise a nod of the head is sufficient to pass the succession, while a bequest not contained in a testament is void.

§ 270. Again, a man going to die intestate can charge his heir with a trust, but cannot charge him with a legacy.

§ 270 *a*. Again, a legacy left by codicil is not valid, unless the codicil is ratified, that is, unless the testator has provided in his will that any codicil should be valid: whereas a trust requires no ratification of the codicil.

§ 271. A legatee cannot be charged with a legacy, but can be charged with a trust, and the beneficiary of a trust may himself be

rursus alii per fideicommissum relinquere possumus.

charged with a further trust.

§ 272. Item servo alieno directo libertas dari non potest: sed per fideicommissum potest.

§ 272. A slave of a stranger cannot be enfranchised by direct bequest but may by the interposition of a trust.

§ 273. Item codicillis nemo heres institui potest neque exheredari, quamvis testamento confirmati sint. at hic qui testamento heres institutus est potest codicillis rogari, ut eam hereditatem alii totam vel ex parte restituat, quamvis testamento codicilli confirmati non sint.

§ 273. A codicil is not a valid instrument for the institution of an heir or his disinheritance, though ratified by will: but an heir instituted by will may be charged by a codicil to convey the estate in whole or in part to another person without any previous ratification by will.

§ 274. Item mulier quae ab eo qui centum milia aeris census est per legem Voconiam heres institui non potest, tamen fideicommisso relictam sibi hereditatem capere potest.

§ 274. A woman, whom a testator registered in the census as owning a hundred thousand sesterces is forbidden by the lex Voconia to institute heiress, can take the succession by the intervention of a trustee.

§ 275. Latini quoque qui hereditates legataque *e* directo iure lege Iunia capere prohibentur ex fideicommisso capere possunt.

§ 275. Latini Juniani, who are disabled by the lex Junia from taking an inheritance or legacy by direct devise, can take it by means of a declaration of trust.

§ 276. Item cum senatusconsulto prohibitum sit proprium servum minorem annis XXX liberum et heredem instituere, plerisque placet posse nos iubere liberum esse, cum annorum XXX erit, et rogare, ut tunc illi restituatur hereditas.

§ 276. A decree of the senate (rather, the lex Aelia Sentia 1 § 18) incapacitates a testator's slave under thirty years of age for being enfranchised and instituted heir; but, according to the prevalent opinion, he can be ordered to be free on attaining the age of thirty, and the heir may be bound by a declaration of trust to then convey the inheritance to him.

§ 277. Item quamvis non *possimus* post mortem eius qui nobis heres extiterit, alium in locum eius heredem instituere, tamen possumus eum rogare, ut cum morietur, ali*i* eam hereditatem totam vel ex parte restituat. et quia post mortem quoque heredis fideicommissum dari potest, idem efficere possumus et si ita scripserimus : CUM TITIUS HERES MEUS MORTUUS ERIT, VOLO HEREDITATEM MEAM AD PUBLIUM MAEVIUM PERTINERE. utroque autem modo, tam hoc quam illo, Titius heredem

§ 277. An heir in remainder after the death of a prior heir cannot be instituted, but an heir may be bound by a declaration of trust to convey the estate, when he dies, in whole or in part to another person; or, as a trust may be limited to take effect after the death of the trustee, the same purpose may be accomplished in these terms: 'When my heir is dead, I wish my inheritance to go to Publius Mevius;' and whichever terms are employed, the heir of my heir is bound by a

suum obligatum relinquit de fideicommisso restituendo.

§ 278. Praeterea legata *per* formulam petimus: fideicommissa vero Romae quidem aput Consulem vel aput eum Praetorem qui praecipue *de* fideicommissis ius dicit persequimur; in provinciis vero aput Praesidem provinciae.

§ 279. Item de fideicommissis semper in urbe ius dicitur: de legatis vero, cum res aguntur.

§ 280. Fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debebit: legatorum vero usurae non debentur; idque rescripto divi Hadriani significatur. scio tamen Iuliano placuisse in eo legato quod sinendi modo relinquitur idem iuris esse quod in fideicommissis: quam sententiam et his temporibus magis optinere video.

§ 281. Item legata Graece scripta non valent: fideicommissa vero valent.

§ 282. Item si legatum per damnationem relictum heres infi*ti*etur, in duplum *cum eo* agitur: fideicommissi vero nomine semper in simplum persecutio est.

§ 283. Item *quod* quisque ex fideicommisso plus debito per errorem solverit, repetere potest: at id quod ex causa falsa per damnationem legati plus debito solutum sit, repeti non potest. idem scilicet iur*i*s est de eo [legato] quod non debitum vel ex hac vel ex illa causa per errorem solutum fuerit.

§ 284. Erant etiam aliae differentiae, quae nunc non sunt.

§ 285. Ut ecce peregrini poterant fide*i*commissa *capere*: et fere ha*ec* fuit origo fide*i*commiss*orum*. sed

trust to convey the inheritance to the person designated.

§ 278. Legacies are recovered by judex and formula; trusts are enforced by the extraordinary jurisdiction of the consul or praetor fideicommissarius at Rome; in the provinces by the extraordinary jurisdiction of the president.

§ 279. Cases of trust are heard and determined at Rome at all times of the year; cases of legacy can only be litigated during the trial term.

§ 280. Trusts entitle to payment of interest and interim profits on delay of performance by the trustee; legatees are not entitled to interest, as a rescript of Hadrian declares. Julianus, however, held that a legacy bequeathed in the form of permission is on the same footing as a trust, and this is now the prevalent doctrine.

§ 281. Bequests expressed in Greek are invalid; trusts expressed in Greek are valid.

§ 282. An heir who disputes a legacy in the form of condemnation is sued for double the sum bequeathed; a trustee is only suable for the simple amount of the subject of trust.

§ 283. On overpayment by mistake in the case of a trust, the excess can be recovered back by the trustee; on overpayment by mistake of a bequest by condemnation, the excess cannot be recovered back by the heir; so, on total failure of a disposition and payment by mistake, a trust sum can, a legacy by condemnation cannot, be recovered back.

§ 284. There formerly were other differences which are now abolished.

§ 285. Thus aliens could be benefited by a declaration of trust, and this was the principal motive in

postea id prohibitum est; et nunc ex oratione divi Hadriani senatusconsultum factum est, ut ea fideicommissa fisco vindicarentur.

which trusts originated, but afterwards they were incapacitated; and now, by a decree of the senate passed on the proposition of Hadrian, property devised in trust for the benefit of aliens is confiscated.

§ 286. Caelibes quoque qui per legem Iuliam hereditates legataque capere prohibentur, olim fideicommissa videbantur capere posse. Item orbi qui per legem Papiam, ob id quod liberos non habent, dimidias partes hereditatum legatorumque perdunt, olim solida fideicommissa videbantur capere posse. sed postea senatusconsulto Pegasiano perinde fideicommissa quoque, ac legata hereditatesque capere posse prohibiti sunt. eaque translata sunt ad eos qui testamento liberos habent, aut si nullus liberos habebit, ad populum, sicuti iuris est in legatis et in hereditatibus.

§ 286. Celibates, who are disabled by the lex Julia from taking successions or legacies, were formerly deemed capable of benefiting by a declaration of trust. And childless persons, who forfeit by the lex Papia half the successions and legacies destined for them, were formerly deemed capable of taking the whole as beneficiaries of a trust. But at a later period the Sc. Pegasianum extended to trust dispositions the disabilities which attach to legacies and successions, and made the trust fund escheat to the devisees and legatees who have children, and, failing devisees and legatees with children, to the state, in the same way as legacies and successions.

§ 287. Eadem aut simili ex causa autem olim incertae personae vel postumo alieno per fideicommissum relinqui poterat, quamvis neque heres institui neque legari ei possit. sed senatusconsulto quod auctore divo Hadriano factum est idem in fideicommissis quod in legatis hereditatibusque constitutum est.

§ 287. From the same or a similar reason an uncertain person or an afterborn stranger could formerly take the benefit of a trust, though he could neither take as heir nor as legatee, until a decree of the senate, passed on the proposition of the emperor Hadrian, extended to trust funds the disabilities relating to legacies and successions.

§ 288. Item poenae nomine iam non dubitatur nec per fideicommissum quidem relinqui posse.

§ 288. Penal dispositions are at last decided to obtain no validity by being clothed in a fiduciary form.

§ 289. Sed quamvis in multis iuris partibus longe latior causa sit fideicommissorum, quam eorum quae directo relinquuntur, in quibusdam tantumdem valeant: tamen tutor non aliter testamento dari potest quam directo, veluti hoc modo: LIBERIS MEIS TITIUS TUTOR ESTO, vel ita: LIBERIS MEIS TITIUM TUTOREM DO: per fideicommissum vero dari non potest.

§ 289. Although in many circumstances declarations of trust have an ampler scope than direct dispositions, and in some respects are on a par, yet a testamentary guardian can only be appointed by direct nomination, as thus: 'Be Titius guardian to my children;' or thus: 'I nominate Titius guardian to my children;' he cannot be appointed indirectly by the intermediation of a trustee.

§ 264. Justinian declares that the heir is not forthwith released from his obligation by the owner's refusal to sell, but will be bound to seize any opportunity that may subsequently offer of purchasing and manumitting the slave in pursuance of the trust, Inst. 2, 24, 2.

§ 270. Codicils, according to Justinian, first acquired legal validity in the time of Augustus, who being trustee under a codicil set the example of performing the trust. The jurist Trebatius being consulted by Augustus, whether it was possible to give legal force to codicils without defeating the policy of testamentary law, gave a decided opinion in the affirmative; and all scruples respecting the validity of codicils vanished when it became known that codicils had been left by the eminent jurist Labeo.

Codicillus is the diminutive of codex, and denotes the less important and solemn documents or instruments of a man of business, a pocket-book, an agenda, a codicil; as codex denotes the more important and formal documents, a journal, a ledger, a will. A codicil enabled a testator who had solemnly executed a will to add to or modify its dispositions without the necessity of re-execution. It was usual in a will to ratify any prior or subsequent codicils; a codicil, however, might exist without any will. An informal will could only take effect as a codicil if such was the expressed intention of the testator. A codicil could not contain an institution or disinheritance or substitution; but it might contain a trust for the transfer of the whole of an inheritance: and though a codicil could not contain a disinheritance, yet we have seen that a codicillary declaration that the successor was unworthy produced confiscation or ereption of the inheritance for indignitas. A testator could only leave a single will, for a later will revoked a former; but he might leave many codicils. A codicil needed no formalities, though Justinian required the attestation of five witnesses, not, however, as an essential solemnity, but as a means of proof: for, in the absence of five witnesses, the heir might be required to deny the existence of a declaration of trust upon his oath, Inst. 2, 23, 12. The admission of codicils was a departure from the rule requiring a unity in the act of testation. The concentration of his last will in a single act disposing simultaneously of the universal succession was no longer required of the testator. He now might distribute his fortune in a series of fragmentary or piecemeal and unrelated dispositions.

§ 278. Fideicommissa were enforced by persecutio, or the praetor's extraordinaria cognitio.

§ 279. The law terms at Rome during the greater part of the formulary period, were of two different kinds: (1) the juridical term or term for jurisdictio, and (2) the judicial term or term for trials.

(1) The term for jurisdiction, that is, for the solemn acts of the praetor sitting on the tribunal in his court in the comitium, was that originally prescribed for the ancient legis actiones. The year was divided into forty dies fasti, unconditionally allotted to juridical proceedings, one hundred and ninety dies comitiales, available for juridical purposes unless required for the legislative assemblies, dies intercisi, of which certain hours were available for jurisdiction, and sixty dies nefasti, which were absolutely unavailable for juridical proceedings.

(2) Judicia, or trials before a judex in the forum, were unaffected by dies fasti and nefasti, but dependent on another division, dies festi and profesti: dies festi (days devoted to feriae, ludi, epulae, sacrificia) being exempted from litigation. Besides these occasional interruptions of litigation, there were longer set vacations, which we find rearranged on several occasions. Thus at one time we find two judicial terms (rerum actus, cum res aguntur) in the year, a winter and a summer term, and two vacations, one in spring and another in autumn. Claudius substituted a single vacation at the close of the year, and made the law term continuous. Rerum actum, divisum antea in hibernos aestivosque menses, conjunxit, Suetonius, Claudius, 23. Galba abolished this vacation, and confined the intervals of litigation to dies feriati. Marcus Aurelius, in the time of Gaius, abolished the distinction between the jurisdiction term (dies fasti) and the trial term (rerum actus). He devoted two hundred and thirty days (adding the number of dies fasti to the number of dies comitiales) to forensic proceedings, under the name of dies juridici or dies judiciarii, and allowed even the rest of the year, dies feriati, to be used for litigation with the consent of the parties. Judiciariae rei singularem diligentiam adhibuit: fastis dies judiciarios addidit, ita ut ducentos triginta dies annuos rebus agendis litibusque disceptandis constitueret, Capitolinus, Marcus, 10. 'He also regulated the administration of justice, noting forensic days in the calendar, and allotting two hundred and thirty to litigation and civil suits.'

Subsequently to the time of Gaius, a law of Valentinian, Theodosius, and Arcadius, A.D. 389, while it declared the principle that

all days are dies juridici, excepted, besides Sundays and certain other holidays, two months for harvest and vintage, and two weeks at Easter. Justinian further appointed, by way of interpolation in this law, certain vacations at Christmas, Epiphany, and Pentecost, Cod. 3, 12, 7, thus furnishing the model on which the four English law terms were regulated by Edward the Confessor. Subsequently, the Statute of Westminster, 3, Edward I, permitted assizes, i.e. trials by jury of issues of fact, to be held in the vacations, re-establishing a distinction corresponding to that of jurisdictional (dies fasti) and judicial terms (rerum actus): with this difference, however, that as the same judicial authorities preside over proceedings in banco, or issues of law, and proceedings at nisi prius, or issues of fact, the seasons set apart for the latter, that is, the trial terms, are merely the vacations of the former, that is, of the sittings in banco. See Puchta, Institutionen, § 158.

§ 280. After the time of Gaius the liability of a defendant to interest and profits (fructus) from the date on which he was guilty of MORA appears to have been extended to all legacies without exception. Ex mora praestandorum fideicommissorum vel legatorum fructus et usurae peti possunt: mora autem fieri videtur cum postulanti non datur, Paulus 3, 8, 4. 'Delay of the heir to satisfy trusts and legacies entitles the cestui que trust and legatee to fruits and interest. Delay dates from the ineffectual demand of the creditor.'

A demand however is not requisite when a term for payment was fixed in the disposition which gave rise to the debt (dies adjecta): in other words, no interpellation is necessary in an obligatio ex die, i.e. an obligatio with a dies adjecta; for then Mora begins at the expiration of the term. This is expressed by modern jurists in the maxim: dies interpellat pro homine: 'the day demands instead of the creditor.'

A further condition of Mora is the absence of all doubt and dispute, at least of all dispute that is not frivolous and vexatious, as to the existence and amount of the debt. Qui sine dolo malo ad judicem provocat non videtur moram facere, Dig. 50, 17, 63. 'An honest appeal to a judge is not deemed a mode of Delay.'

The date of Mora must not be identified with that of the Nativity of an action (actio nata), an important date, as we shall see, in the doctrine of Limitation or Prescription of which it is the starting point, a starting point that may be antecedent to Mora. Mora

generally cannot precede an interpellation or demand of payment: but the omission of a demand is precisely a part of that course of remissness and negligence whereby, under the rules of Prescription, a creditor ultimately forfeits his right to sue. Savigny, § 239.

Mora in the sphere of Obligation and Personal actions exactly corresponds to Mala fides or Mala fide possessio in the sphere of Dominion and Real actions. Both imply a consciousness of wrong, that is to say, Culpa in the larger sense in which it comprehends Dolus: with this reservation, that Mora is an omission or negative act, which sometimes arises, not from want of will, but from want of means or ability to pay; whereas Mala fide possessio is a positive act that is always wilful and dolose. Both Mora, then, and Mala fide possessio have a delictual character.

Litis Contestatio, the first stage in an action, another landmark of great importance in Roman jurisprudence in ascertaining and measuring the sanctioning rights and obligations of suitors, is a kind of bilateral Disposition which may be classed among Quasi-contracts and, except when merely frivolous and vexatious, is entirely devoid of delictual character. The consequences, however, of Litis contestatio, in spite of this difference of character, are similar to those of Mora and Mala fide possessio. For, in order to save a plaintiff from being ruined by the duration of a trial, Litis contestatio is supposed to be followed immediately by judgment; or, in other words, Litis contestatio entitles him, in respect of fructus and usurae, to all the rights to which he is entitled by lata sententia.

The rules for the restitution by a defendant of all the accessions (omnis causa), that is of fruits and interest, in addition to the principal subject of litigation, are the following:

(A) In real actions a Bona fide possessor, in respect of the period before Litis contestatio, is only liable for fructus extantes: that is, he is bound to restore such fruits of a fruit-producing movable or immovable as still remain in his possession: but he is not liable to make compensation for fructus consumptos, such fruits as he has consumed before Litis contestatio: nor is he liable for what are sometimes called fructus percipiendi, but which perhaps are better called fructus neglecti, fruits which he has neglected or carelessly allowed to perish, before that period.

After Litis contestatio a Bona fide possessor is liable both for the fruits that he consumes and for those that he allows to perish.

In the time before the ordinance of Hadrian called Sc. Juven-

tianum the Mala fide possessor was liable for collected fruits (fructus perceptos), whether extant or consumed, from the inception of his possession, but was not liable for those he neglected up to Litis contestatio. After the Sc. Juventianum the Mala fide possessor was liable for the fruits he neglected, as well as for those he collected, from the inception of his possession. After Litis contestatio he is further liable for fruits which he cannot collect but which the plaintiff might have secured had he been in possession.

Thus after Litis contestatio the liabilities of the Mala fide possessor are aggravated; and the Bona fide possessor has the same liabilities after Litis contestatio as the Mala fide possessor had before Litis contestatio; being liable for fructus consumpti and fructus neglecti as well as for fructus extantes.

The Bona fide possessor is not liable for fructus consumptos, because Separatio, as we have seen p. 203, makes fructus the property of Bona fide possessor. He is liable, however, for fructus extantes, because although he became proprietor of them by Separatio, yet he is under an Obligation to convey them to the plaintiff who proved himself to be the true proprietor of the principal or fruit-producing object; and it is a part of the officium judicis or official duty of the judge to compel the defendant to perform this obligation, Inst. 4, 17, 2. The principal object itself requires no conveyance, being already the property of the plaintiff.

(B) In personal actions belonging to the class called bonae fidei, fruits must be restored from the date of Mora, or in the absence of Mora, from the date of Litis contestatio.

In personal actions belonging to the class of condictions or stricti juris actions originally no fruits were recoverable: at a later period fruits were recoverable after Litis contestatio.

In personal actions, whether bonae fidei or stricti juris, brought not for the original acquisition of property (consecutio) but for the recovery of what has already been the plaintiff's property (repetitio), all fruits are recoverable that are produced since the inception of the obligation.

In personal actions bonae fidei, interest (usurae) is payable from the date of Mora, or, in the absence of Mora, from Litis contestatio.

In condictions (stricti juris actiones), interest is not payable from Mora but only from Litis contestatio: except that in condictio certi, an action brought to recover a loan of money (mutuum), it being necessary that the intentio should express the precise sum

that was lent, and that the condemnatio should coincide with the intentio; no interest was recoverable even from Litis contestatio. As, however, this peculiarity of Certi condictio only arose from the nature of the formula, it ought not to have been retained by Justinian, in whose era the formulary system had been long discontinued.

The result is this: interest on a debt is to be paid, in all but stricti juris actions, from the day fixed for payment; or, failing such a day, from the day of demand; or, failing both such days, from the commencement of litigation (Litis contestatio): in stricti juris actions it is only paid from the commencement of litigation, and not even then in Condictio certi. In the first cases the Title to interest is Mora; in the last, Litis contestatio.

Mora and Mala fides and Litis contestatio are not only important in respect of the defendant's liability for fructus and usurae, but also in respect of his liability for the intentional (dolus), negligent (culpa), or, accidental (casus) destruction or deterioration of the subject of litigation.

In personal actions, after Litis contestatio, a defendant is liable for any deterioration whether by dolus or culpa: and whereas before Litis contestatio he is only liable for deterioration produced by gross negligence (culpa lata), after Litis contestatio he is liable for any degree of negligence (omnis culpa).

A defendant is liable for accidental destruction or deterioration (periculum) from the date of Mora even before Litis contestatio.

In Real actions the Bona fide possessor must indemnify the plaintiff for any deterioration produced either by dolus or by culpa after Litis contestatio: for after that stage he is under an obligation to use the utmost care in the custody of the matter in dispute.

The Bona fide possessor might become Morosus or guilty of Mora after Litis contestatio, namely by contumacious disobedience to the order (arbitrium, jussus) of the judex directing him to make restitution; and then he became liable for casus. In modern Roman jurisprudence, the actiones arbitrariae being discontinued, this liability of Bona fide possessor for casual deterioration after Mora can never occur.

The Mala fide possessor is liable for culpa as well as for dolus even before Litis contestatio; but, in the absence of Mora, he is not liable for casus. After Litis contestatio he is liable for casus; and

so he is before Litis contestatio, if taxable with Mora. In this respect, then, Mora is more serious in its consequences than Mala fides: for Mora in every case is a title to liability for casus; whereas Mala fides only produces this liability in conjunction with Litis contestatio.

Mora had also an important influence in fixing the date of litis aestimatio, i. e. the date for the valuation of the thing whose value the defendant was condemned to pay. See 3 § 180 com.; Savigny, §§ 264–277.

§ 283. Money paid by mistake was not recoverable when the payor was liable to be sued for double damages, Inst. 3, 27, 7, because then the payment is not deemed to be a mistake, but a compromise, in order to avoid the chance of condemnation in double damages. The laws protecting certain rights by duplication of damages, 4 § 171, would have been evaded if a defendant was allowed to pay the simple damages and then attempt to recover them back by condictio indebiti soluti.

§ 285. So by English law aliens were not, till recently, allowed to purchase land or to take land by devise. Land purchased by an alien or devised to an alien was forfeited to the crown. An alien, however, could hold personal property and take bequests of personal property. In France, formerly, an alien was not allowed to make a will, but all his property at his death escheated to the crown by the droit d'aubaîne. [Aubain is from alibanus. Alibi in barbarous Latin produced alibanus, just as longiter produced lontanus and ante antianus. Diez.]

§ 289. Justinian abolished the distinction between legacies and trusts, enacting that legacies should no longer be governed by the rigours of the civil law, but subject to the same rules and construed with the same liberality as trusts, Inst. 2, 20, 3. Trusts being a matter of the praetor's cognitio extraordinaria cannot, properly speaking, be called a subject of Bonae fidei actio, for actio implies the cognizance of a judex: but the principles of cognitio extraordinaria were doubtless the same as those of bonae fidei actio. With this reservation, then, we may say that legata sinendi modo and per damnationem were before Justinian's time recoverable by stricti juris actio, and after his time by bonae fidei actio.

By English law, a will of lands operates as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title. A will of personalty requires for its authentication to be

proved before a court by the oath of the executor and, unless the attestation clause is in a certain form, by the affidavit of one of the subscribing witnesses; or, if the validity of the will is disputed, by examination of the witnesses on oath in the presence of the parties interested. The will itself is deposited in the registry of the Court of Probate; a copy of it in parchment, under the seal of the Court of Probate, delivered to the executor along with a certificate of proof, is the only proper evidence of his right to intermeddle with the personal estate of the testator.

The following were the corresponding formalities of Roman law:—

Tabulae testamenti aperiuntur hoc modo, ut testes vel maxima pars eorum adhibeatur qui signaverint testamentum; ita ut, agnitis signis, rupto lino, aperiatur et recitetur, atque ita describendi exempli fiat potestas, ac deinde signo publico obsignatum in archium redigatur, ut si quando exemplum ejus interciderit, sit unde peti possit.

Testamenta in municipiis, coloniis, oppidis, praefectura, vico, castello, conciliabulo facta, in foro vel basilica praesentibus testibus vel honestis viris inter horam secundam et decimam diei recitari debebunt, exemploque sublato ab iisdem rursus magistratibus obsignari quorum praesentiâ constat aperta.

Testamentum lex statim post mortem testatoris aperiri voluit, et ideo, quamvis sit rescriptis variatum, tamen a praesentibus intra triduum vel quinque dies aperiendae sunt tabulae; ab absentibus quoque intra eos dies cum supervenerint: nec enim oportet tam heredibus aut legatariis aut libertatibus quam necessario vectigali moram fieri, Paulus, Sent. Rec. 4, 6.

'A will is opened in the following manner: the witnesses, or the majority, who affixed their seals, are summoned and acknowledge their seals, the cord is broken, the tablets are opened, the will is read, a copy is taken, a public seal is affixed to the original, and it is deposited in the archives, so that if the copy is ever lost there may be a means of making another.

'In municipalities, colonies, towns, prefectures, wicks, castles, staples, a will must be read in the forum or basilica, in the presence of the attesting witnesses or of respectable persons, between eight o'clock in the morning and four o'clock in the afternoon; and, as soon as a copy has been made, must be sealed up again by the magistrate in whose presence it was opened.

'A will is intended by the law to be opened immediately after

the death of the testator; accordingly, though rescripts have varied, it is now the rule that, if all the parties are present, three or five days is the interval within which the tablets must be opened; if they are absent, the same number of days after they are assembled; in order that heirs, legatees, manumitted slaves, and the military treasury (entitled, 3 § 125, to vicesima hereditatum, i.e. 5 per cent. on the value of Roman citizens' testamentary successions), may come into their rights without unnecessary delay.'

In cases of urgency, when the will was opened in the absence of the attesting witnesses in the presence of respectable persons, it was afterwards forwarded to the witnesses for the verification of their seals, Dig. 29, 3, 7. Every one who desired it had the power of inspecting a will and taking a copy, Dig. 29, 3, 8.

BOOK III.

DE RERUM UNIVERSITATIBUS ET DE OBLIGATIONIBUS.

DE HEREDITATIBUS QUAE AB INTESTATO DEFERUNTUR.

§ 1. *Intestatorum hereditates lege* XII *tabularum primum ad suos heredes pertinent.*

§ 1. Intestate successions by the law of the Twelve Tables devolve first to self-successors.

§ 2. *Sui autem heredes existimantur liberi qui in potestate morientis fuerint, veluti filius filiave, nepos neptisve ex filio, pronepos proneptisve ex nepote filio nato prognatus prognatave. nec interest utrum naturales sint liberi, an adoptivi. Ita demum tamen nepos neptisve et pronepos proneptisve suorum heredum numero sunt, si praecedens persona desierit in potestate parentis esse, sive morte id acciderit sive alia ratione, veluti emancipatione: nam si per id tempus quo quis moritur filius in potestate eius sit, nepos ex eo suus heres esse non potest. idem et in ceteris deinceps liberorum personis dictum intellegemus.*

§ 2. Self-successors are children in the power of the deceased at the time of his death, such as a son or a daughter, a grandchild by a son, a great-grandchild by a grandson by a son, whether such children are natural or adoptive: subject, however, to this reservation, that a grandchild or great-grandchild is only self-successor when the person in the preceding degree has ceased to be in the power of the parent either by death or some other means, such as emancipation; for instance, if a son was in the power of the deceased at the time of his death, a grandson by that son cannot be a self-successor, and the same proviso applies to the subsequent degrees.

§ 3. *Uxor quoque quae in manu est sua heres est, quia filiae loco est; item nurus quae in filii manu est, nam et haec neptis loco est. sed ita demum erit sua heres, si filius cuius in manu erit, cum pater moritur, in potestate eius non sit. idemque dicemus et de ea quae in nepotis*

§ 3. A wife in the hand of the deceased is a self-successor, for she is a quasi daughter; also a son's wife in the hand of the son, for she is a quasi granddaughter; subject, however, to the proviso that she is not self-successor if her husband is in the power of his father at the

manu matrimonii causa sit, quia proneptis loco est.

time of his father's death. A wife in the hand of a grandson is a self-successor, subject to the same proviso, because she is a quasi great-granddaughter.

§ 4. *Postumi quoque, qui si vivo parente nati essent, in potestate eius futuri forent, sui heredes sunt.*

§ 4. After-born children, who, if born in the lifetime of the parent, would have been subject to his power, are self-successors.

§ 5. *Idem iuris est de his quorum nomine ex lege Aelia Sentia vel ex senatusconsulto post* mortem patris causa probatur: nam et hi vivo patre causa probata in potestate eius futuri essent.

§ 5. Also those in whose behalf the provisions of the lex Aelia Sentia (1 § 32) or the senatusconsult have been satisfied by proof of excusable error subsequently to the death of the parent, for if the error had been proved in the lifetime of the parent they would have been subject to his power.

§ 6. Quod etiam de eo filio, qui ex prima secundave mancipatione post mortem patris manumittitur, *in*tellegemus.

§ 6. Also, a son, who has undergone a first or second mancipation and is manumitted after the death of the father, is a self-successor.

§ 7. Igitur cum filius filiave, et ex altero filio nepotes neptesve extant, pariter ad hereditatem vocantur; nec qui gradu proximior est ulteriorem excludit: ae*qu*um enim videbatur nepotes neptesve in patris sui locum portionemque succede*re*. pari ratione et si nepos neptis*ve* sit ex filio et ex nepote pronepos *pro*neptisve, simul omnes vocantur ad hereditatem.

§ 7. Accordingly, a son or daughter and grandchildren by another son are called contemporaneously to the succession; nor does the nearer grade exclude the more remote, for justice seemed to dictate that grandchildren should succeed to their father's place and portion. Similarly, a grandchild by a son and a great-grandchild by a grandson by a son are called contemporaneously to the succession.

§ 8. Et quia placebat nepotes ne*ptes*ve, item pronepotes proneptesve in parentis sui locum succedere: conveniens esse visum est non in capita, sed *in* stirpes hereditates dividi, ita ut filius partem dimidiam hereditatis ferat, et ex altero filio duo pluresve nepotes alteram dimidiam; item si ex duobus filiis nep*otes* extent, et ex altero filio unus forte vel duo, ex altero tres aut quattuor, ad unum aut ad duos dimidia pars pertineat, et ad tres aut quattuor altera dimidia.

§ 8. And as it was deemed to be just that grandchildren and great-grandchildren should succeed to their father's place, it seemed consistent that the number of stems, and not the number of individuals, should be the divisor of the succession; so that a son should take a moiety, and grandchildren by another son the other moiety; or if two sons left children, that a single grandchild or two grandchildren by one son should take one moiety, and three or four grandchildren by the other son the other moiety.

§ 1. The words 'testate' and 'intestate,' in the language of English lawyers, are only applicable, I believe, to a deceased person. The awkwardness of having no corresponding adjectives to couple with succession must be my apology for sometimes speaking of testate or intestate succession.

For the meaning of suus heres, see commentary on 2 § 157 and 2 § 123.

DE LEGITIMA AGNATORUM SUCCESSIONE.

§ 9. Si null*us sit* suorum heredum, tunc hereditas p*ertinet* ex eadem lege XII tabularum ad *ad*gnatos.

§ 9. If there is no self-successor, the succession devolves by the same law of the Twelve Tables to the agnates.

§ 10. *Vocantur autem* adgnati qui legitima cognatione iuncti sunt: legitima autem cognatio est ea quae per virilis sexus persona*s coniungitur. itaque eodem patre nati* fratre*s* agn*ati sibi sunt, qui etiam consanguinei* vocantur, nec requiritur an *etiam matrem eandem habuerint.* item patruus fratris filio et invicem *is illi a*gnatus est. eodem numero *sunt fratres* patrueles *inter se, id est* qui ex duobus f*ratribus progene*rati sunt, quo*s* pleriq*ue etiam consobrinos vocant. qua ratione scilicet etiam ad plures gradus agnationis pervenire poterimus.*

§ 10. Agnates are statutory cognates. Statutory cognates are kindred related through males. Thus brothers by the same father are agnates, though by different mothers, and are called consanguineous; and a father's consanguineous brother is agnate to the nephew, and vice versâ; and the sons of consanguineous brothers, who are called consobrini, are mutual agnates; so that there are various degrees of agnation.

§ 11. *Non tamen omnibus simul a*g*na*tis d*a*t lex XII tabularum hereditatem, sed his q*ui tunc, cum certum est aliquem intestato decessisse, proximo* gradu sunt.

§ 11. Agnates are not called all contemporaneously to the succession by the Law of the Twelve Tables, but only those of the nearest degree at the moment when it is certain that the deceased is intestate.

§ 12. Nec in eo iure successio *est: ideoque si a*gnatus proximus hereditat*em* omiserit, *vel antequam adierit,* decesserit, sequentibus nihil iuris ex *lege com*petit.

§ 12. And in title by agnation there is no advancement of grades; that is to say, if an agnate of the nearest grade decline the succession, or die before acceptance, the agnates of the next grade do not become entitled under the statute.

§ 13. Ideo autem non mortis tempore, *quis proximus sit requirimus, sed eo* tempore *quo certum fuerit aliquem intestatum decessisse, quia si quis testamento f*acto deces-

§ 13. The date for determining the nearest agnate is not the moment of death, but the moment when intestacy is certain, because it seemed better, when a will is left,

serit, melius *esse* visum est tunc ex iis requiri proximum, cum certum esse coeperit neminem ex eo testamento fore heredem.

to take the nearest agnate at the moment when it is ascertained that there will be no testamentary successor.

§ 14. Quod ad feminas tamen attinet, in hoc iure aliu*d* in ipsarum hereditatibus capiendis placuit, aliu*d* in ceterorum bonis ab his capiendis. nam feminarum *hereditat*es per*i*nde ad nos a*g*nationis iure redeunt atque masculorum: nostrae vero hereditates ad feminas ultra consanguineorum gradum non pertinent. itaque soror fratri sororive legitima heres est; amita vero et fra*tris* filia legitima heres esse *non potest. sororis autem nobis loco est e*tiam mater aut noverca quae *per in ma*num conventionem aput patrem nostrum iura filiae con*secu*ta est.

§ 14. As to females, the rules of title by descent are not the same in respect of the successions which they leave and in respect of the successions which they take. An inheritance left by a female is acquired by a male by the same title of agnation as an inheritance left by a male, but an inheritance left by a male does not devolve to females beyond sisters born of the same father. Thus a sister succeeds to a sister or brother by the same father, but the sister of a father and daughter of a brother have no statutory title by descent. The rights of quasi sister belong to a mother or stepmother who passes into the hand of a father by marriage and acquires the position of a quasi daughter.

§ 15. Si ei qui defunctus erit *sit* frater et alterius fratris filius, sicut ex superioribus intellegitur, frater prior est, quia gradu praecedit. sed alia facta est iuris interpretatio inter suos heredes.

§ 15. If the deceased leaves a brother and another brother's son, as observed above (§ 11), the brother has priority, because he is nearer in degree, which differs from the rule applied to self-successors.

§ 16. Quodsi defuncti nullus frater extet, *sed* sint liberi fratrum, ad omnes quidem hereditas pertinet: sed quaesitum est, si dispari forte numero sint nati, ut ex uno unus vel duo, ex altero tres vel quattuor, utrum in stirpes dividenda sit hereditas, sicut inter suos heredes iuris est an potius in capita. ia*m*dudum tamen placuit in capita dividendam esse hereditatem. itaque quotquot erunt ab utraque parte personae, in tot portiones hereditas dividetur, ita ut singuli singulas portiones ferant.

§ 16. If the deceased leaves no brother, but children of more than one brother, they are all entitled to the succession; and it was once a question, in case the brothers left an unequal number of children, whether the number of stems was to be the divisor of the inheritance, as among self-successors, or the number of individuals; however, it has long been settled that the divisor is the number of individuals. Accordingly, the total number of persons determines the number of parts into which the inheritance must be divided, and each individual takes an equal portion.

§ 17. Si nullus agnatus sit, eadem le*x* XII tabularum gentiles ad here-

§ 17. In the absence of agnates the same law of the Twelve Tables calls

ditatem vocat. qui sint autem gentiles, primo commentario rettulimus. et cum illic admonuerimus totum gentilicium ius in desuetudinem abisse, supervacuum est hoc quoque loco de ea re curiosius tractare.

the gentiles to the succession. Who are gentiles was explained in the first book, and as we then stated that the whole law relating to gentiles is obsolete, it is unnecessary to go into its details on the present occasion.

§ 9. The term agnatio has already occurred (2 § 131) in the exposition of testacy, where it denoted the birth of a suus heres, and in the doctrine of intestacy it has the same signification. The same persons who in relation to a common ancestor are sui heredes, in relation to one another are agnati. Agnates, accordingly, may be described as all the members of a family; but then we must add that the family may either be actual or ideal, meaning by ideal either a family once actual but disintegrated by the death of the ancestor, or a family purely imaginary. While the common ancestor survives, the bonds of agnation are close, and the family is actual; after his death, when his descendants have formed separate families, all the members of those families are still agnates, because they are members of an ideal family which once was actual; and the descendants of those descendants are more remotely agnates, because, though never members of an actual family, they would have been so if the common ancestor had lived for, say, a hundred or a thousand years.

The words of the Twelve Tables creating title by agnation are as follow: Si intestato moritur cui suus heres nec escit, adgnatus proximus familiam habeto. 'If a man die intestate leaving no self-successor, his nearest agnate (the nearest self-successor of one of his ancestors) shall have the succession.'

§ 10. Consanguinei, brothers or sisters by the same father, opposed to uterini, brothers or sisters by the same mother, are properly included among agnates, being agnates of the first degree; but sometimes the word 'agnates' specifically denotes the subsequent degrees, and as females were only entitled to inherit by the first degree of agnation, § 14, the word 'agnates' was further limited to denote male agnates. Agnati autem sunt cognati virilis sexus per virilem descendentes, Paulus, Sent. Rec. 4, 8, 13. 'Agnates are male cognates related through males.'

§ 12. If the nearest degree of agnates in existence repudiated the succession, or died before acceptance, the succession did not devolve to the next degree of agnates, but passed by a different title

to a different order of claimants, namely, to cognates, or next of kin, Ulpian, 26, 5. This rule was a scrupulous interpretation of the exact words of the Twelve Tables: Si intestato moritur cui suus heres nec escit, adgnatus *proximus* familiam habeto. No innovation in this respect was introduced by the praetors, whose policy was to prefer the natural title of cognation to the civil title of agnation. Justinian, however, abolished the rule, and allowed a devolution through the degrees of agnation, on the ground that, as the burden of tutela devolved through the degrees of agnation, there ought to be a corresponding and compensating devolution of the advantages of inheritance, Inst. 3, 2, 7. This change, however, was deprived of importance by the subsequent Novella, 118, which introduced an entirely new system of succession, governed solely by cognatio.

§ 13. The moment at which it is ascertained that the deceased is intestate will be separated by an interval from the moment of his decease, when the intestacy is caused by the repudiation or incapacitation of the devisee, or the failure of the condition on which he was instituted. In this interval the nearest agnate may die, and a remoter agnate become the nearest agnate. It therefore was necessary to determine whether the title of nearest agnate is acquired at the moment of decease or of ascertained intestacy; and the latter moment was selected. If the death of the testator had been selected, then, if the nearest agnate died in the interval, there would be no heir: not the then next agnate, as proxumus, the word used in the Twelve Tables, excludes successio graduum: nor the gentiles, as the words: si agnatus nec escit, exclude successio ordinum.

§ 14. The limitation, in respect of females, of title by agnation to females who were agnates in the first degree (consanguineae) was not contained in the Twelve Tables, but introduced by the jurists as an interpretation of the lex Voconia (B.C. 168), Paulus, Sent. Rec. 4, 8, 22. The harshness of this limitation was mitigated by the praetors, who introduced title by cognation, and allowed females of remoter degrees of agnation to succeed in the order of cognates in default of successors by title of agnation; but Justinian totally abolished the limitation, and restored the rule of the Twelve Tables, allowing females to succeed in the order of agnates, however remote might be their degree of agnation, provided that no nearer degree was in existence.

The celebrated Novella, 118, as above stated, totally abolished

title by agnation, and made succession by intestacy entirely dependent on the degrees of cognation or natural relationship.

§ 17. A fragment of Ulpian contains the provision of the Twelve Tables: Si agnatus nec escit, gentilis familiam nancitor. 'In the absence of an agnate, the gentile shall have the succession.' Gaius probably gave the definition of Gentiles after 1 § 164, where there is now an hiatus in the MS. Cicero gives the following account: Gentiles sunt qui inter se eodem nomine sunt: non est satis; qui ab ingenuis oriundi sunt: ne id quidem satis est; quorum majorum nemo servitutem servivit: abest etiam nunc; qui capite non sunt deminuti: hoc fortasse satis est, Topica, 6. 'Gentiles are those who bear a common name—this is inadequate; who are born of free-born parents—this is still insufficient; none of whose ancestors were slaves—something still is wanting; who have never suffered a loss of status. This perhaps is a complete definition.' This definition explains why gentility in modern languages implies pure blood, good extraction, noble genealogy; but it leaves the subject wrapped in obscurity. As many of the plebeians were the descendants of manumitted slaves, title by gentility would often imply the devolution of plebeian successions into the hands of patricians, a mode of transmission which would be less and less tolerated as Rome became more and more republican. Cicero, however, mentions a cause founded on title by gentility: Quid, qua de re inter Marcellos et Claudios patricios centumviri judicarunt? Cum Marcelli ab liberti filio stirpe, Claudii patricii ejusdem nominis hereditatem gente ad se redisse dicerent: nonne in ea causa fuit oratoribus de toto stirpis ac gentilitatis jure dicendum? De Orat. 1, 39. 'In the cause between the [plebeian Claudii] Marcelli and the patrician Claudii before the centumviral court, wherein the plebeian Claudii claimed the succession to a freedman's son by title of race, the patrician Claudii by title of gentility, had not the advocates to discuss the whole law of title by race and title by gentility?'

Of the technical meaning of 'stirps' we have no information, but assuming stirps to be identical with cognatio, we may conjecture that the question litigated was this: supposing a patron died without any lineal descendants, and without any agnates: in the succession to the estate of his freedman's son was priority to be given to the gens of the patron, or to the persons entitled under the clause in the edict called (see § 76, commentary) unde cognati

manumissoris? It seems that by a rule of which we have no other notice, the succession to a freedman's son might ascend to the patron or his relatives (agnates, gentiles, cognates); and that the patrician Claudii were the gentiles of the patron, the plebeian Claudii were his cognates, but not his gentiles.

Of the rights of gentiles in the successions of libertini we have a vestige in the restriction relating to gentis enuptio, the disability of liberta to marry the libertus of another gens without a special license. Livy. The requirement of a lex curiata to sanction Arrogations, 1 § 99, and Testaments, 2 § 101, was also probably intended to protect the successoral rights of the Gentiles.

BONORUM POSSESSIO INTESTATI.

§ 18. Hactenus lege XII tabularum finitae sunt intestatorum hereditates: quod ius quemadmodum strictum fuerit, palam est intellegere.

§ 18. These are all the provisions in the law of the Twelve Tables for intestate devolution, and how harshly they operated is patent.

§ 19. Statim enim emancipati liberi nullum ius in hereditatem parentis ex ea lege habent, cum desierint sui heredes esse.

§ 19. For instance, emancipated children forfeit all title to the succession of their parent by being divested of the character of self-successors.

§ 20. Idem iuris est, si ideo liberi non sint in potestate patris, quia sint cum eo civitate Romana donati, nec ab Imperatore in potestatem redacti fuerint.

§ 20. So do children whose freedom from the power of their parent only resulted from their receiving jointly with their father a donation of Roman citizenship (1 § 94), without a fiat of the emperor subjecting them to parental power.

§ 21. Item agnati capite diminuti non admittuntur ex ea lege ad hereditatem, quia nomen agnationis capitis deminutione perimitur.

§ 21. Again, agnates who have descended in status are barred from the succession under the statute, title by agnation being extinguished by descent in status.

§ 22. Item proximo agnato non adeunte hereditatem, nihilo magis sequens iure legitimo admittitur.

§ 22. And if the nearest agnate renounces a succession the next degree, according to the statute, is not a whit the more entitled to succeed.

§ 23. Item feminae agnat*ae* quaecumque consanguineorum gradum excedunt, nihil iuris ex lege habent.

§ 23. Female agnates beyond the degree of sisters by the same father have no title to succeed under the statute.

§ 24. Similiter non admittuntur cognati qui per feminini sexus personas necessitudine iunguntur; adeo quidem, ut nec inter matrem et filium filiamve ultro citroque here-

§ 24. Cognates who trace their kin through females are similarly barred, so that even a mother and a son or daughter have no reciprocal right of succession, unless

ditatis capiendae ius conpetat, praeter quam si per in manum conventionem consanguinitatis iura inter eos constiterint.

§ 25. Sed hae iuris iniquitates edicto Praetoris emendatae sunt.

§ 26. Nam *liberos* omnes qui legitimo iure deficiuntur vocat ad hereditatem proinde ac si in potestate parentum mortis tempore fuissent, sive soli sint sive etiam sui heredes, id est qui in potestate patris fuerunt, concurrant.

§ 27. Ad*g*natos autem capite deminutos non secundo gradu post suos heredes vocat, id est non eo gradu vocat quo per legem vocarentur, si capite minuti non essent; sed tertio, proximitatis nomine: licet enim capitis deminutione ius legitimum perdiderint, certe cognationis iura retinent. itaque si quis alius sit qui integrum ius agnationis habebit, is potior erit, etiam si longiore gradu fuerit.

§ 28. Idem iuris est, ut quidam putant, in eius agnati persona, qui proximo agnato omittente hereditatem, nihilo magis iure legitimo admittitur. sed sunt qui putant hunc eodem gradu a Praetore vocari, quo etiam per legem agnatis hereditas datur.

§ 29. Feminae certe agnatae quae consanguineorum gradum excedunt tertio gradu vocantur, id est si neque suus heres neque agnatus ullus erit.

§ 30. Eodem gradu vocantur etiam eae personae quae per feminini sexus personas copulatae sunt.

§ 31. Liberi quoque qui in adoptiva familia sunt ad naturalium

by subjection to the hand of the husband the mother has become a quasi sister to her children.

§ 25. But to these legal inequalities the edict of the praetor administers a corrective.

§ 26. All children whose statutory title fails are called by the praetor to the succession, just as if they had been in the power of their parent at the time of his decease, whether they come alone or in concurrence with self-successors, that is, with other children who were subject to the power of the parent.

§ 27. Agnates who have descended in status are called by the praetor, not indeed in the next degree to self-successors, that is, in the order in which the statute would have called them but for their loss of status, but in the third rank under the designation of cognates (next of kin); for though their descent in status has blotted out their statutory title, they nevertheless are still entitled as cognates; but if another person exists with unimpaired title by agnation, he is called in preference, although he may be an agnate in a remoter degree.

§ 28. The rule is similar, according to some, in respect of the remoter agnate who has no statutory title to succeed on the renunciation of a nearer agnate; according to others, the praetor calls him to the succession in the order allotted by the statute to agnates.

§ 29. Female agnates, at all events, beyond the degree of sisters are called in the third degree, that is to say, after self-successors and other agnates.

§ 30. So are those persons who trace their kindred through females.

§ 31. Children in an adoptive family are called to succeed their

parentum hereditatem hoc eodem gradu vocantur.

natural parents in the same order.

§ 32. Quos autem Praetor vocat ad hereditatem, hi heredes ipso quidem iure non *fiunt*. *nam* Praetor heredes facere non p*otest*: *per legem enim tantum vel similem iuris* cons*titutionem* h*eredes fiunt*, *veluti* p*er senatusconsultum et* cons*titu*tio*nem* p*rincipalem*: sed *eis si qui*dem Praetor d*et bonorum* po*ssessionem*, *lo*co heredum *constituuntur*.

§ 32. Those whom the praetor calls to a succession do not become successors at civil law, for the praetor cannot make a successor; only a law or similar ordinance can constitute a successor, such as a decree of the senate or an imperial constitution: the praetor's grant of possession only makes the grantee a quasi successor.

§ 33. A*dhuc autem* alios *etiam* co*m*plures *gradus Praetor facit in bonorum possessione danda*, d*um i*d ag*it*, ne *quis sine successore moriatur*. de quibus in his commentariis co*piose non agimus ideo*, *quia* hoc ius t*o*tum propriis co*m*mentariis *quoque* ali*as explicav mus*. *Hoc* solum admonuisse sufficit [*desunt lin.* 36].

§ 33. Several additional grades of grantees of possession are recognized by the praetor in his desire that no one may die without a successor; but I forbear to examine them on the present occasion, because I have handled the whole subject of title by descent in a separate treatise devoted to this matter.

§ 34. *Item ab int*estat*o* heredes suos et agn*atos* ad bonorum possessionem vocat. quibus casibus beneficium eius in eo solo videtur aliquam utilitatem *habere*, *quod* is qui i*ta* bonorum possessionem *petit*, interdicto cuius principium est QUORUM BONORUM uti possit. cuius interdicti quae sit utilitas, suo loco proponemus. alioquin remota quoque bonorum possessione ad eos hereditas pertinet iure civili.

§ 34. Besides these grantees, when a man dies intestate, the praetor grants possession to self-successors or agnates, the only advantage they derive from the grant being that it entitles them to the interdict beginning with the words: 'Whatsoever portion of the goods' (the use of which will be explained in due time and place, 4 § 144), for independently of the grant of possession, they are entitled to the inheritance by the civil law.

§ 35. Ceterum saepe quibusdam ita datur bonorum possessio, ut is cui data sit, *non* optineat hereditatem: quae bonorum possessio dicitur sine re.

§ 35. Possession is often granted to a person who will not have quiet enjoyment, and is then said to be ineffective.

§ 36. *N*am si verbi gratia iure facto testamento heres inst*it*utus creverit hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo, quod iure civil*i* heres sit, nihilo minus ii qui nullo facto testamento ad intestati bona vocantur possunt petere bonorum possessionem: sed sine re ad eos hereditas pertinet, cum testamento scriptus heres e*v*incere hereditatem possit.

§ 36. For instance, if an heir appointed by a duly executed will accepts the inheritance, but omits to demand juxta-tabular possession, contenting himself with his title at civil law, those who without a will would be entitled by descent may nevertheless obtain a grant of intestate possession, but the grant will be ineffective, because they can be evicted by the testamentary heir.

§ 37. Idem iuris est, si intestato aliquo mortuo suus heres nol*uerit petere bonorum possessionem*, con*tentus* l*egitimo iure*. *nam* et agnato competit quidem bonorum possessio, sed sine r*e*, cum evinci hereditas a*b suo* herede potest. et illud convenient*er*, si ad agnatum iure civili pertinet hereditas et hic adierit hereditatem, sed *bonorum possessionem* petere noluerit, et si quis ex proximis cognatus petierit, sine re habebit bonorum possessionem propter eandem rationem.

§ 38. Sunt et alii quidam similes casus, quorum al*iquos* superiore commentario tradidimus.

§ 37. The same happens when a man dies intestate and a self-successor omits to demand possession, contenting himself with his statutory title; for an agnate may obtain a grant of intestate possession, but it will be ineffective, because he can be evicted by the self-successor. Similarly, if an agnate entitled by civil law accepts the succession but omits to demand possession, a cognate can obtain a grant of intestate possession, but only ineffectively, for the same reason.

§ 38. There are other similar cases, some of which were mentioned in the preceding book.

§ 25. To the divergence of the juristic (agnatio) and natural (cognatio) families, to the desire, that is, to correct the non-natural devolution of successions, Sir Henry Maine attributes the introduction in Roman jurisprudence of Testamentary dispositions. Ancient Law.

§ 28. There is no other trace of a difference of opinion as to the order in which a remoter agnate was entitled on the renunciation of a nearer. Justinian states that before his time such an agnate was only entitled to succeed in the order of cognates, but altered the rule and allowed him to succeed in the order of agnates; that is to say, introduced a devolution of title from nearer to remoter agnates on the renunciation of the former, Inst. 3, 2, 7.

§ 32. The praetor, as executive power:

(1) Gave possession to the person entitled by law, that is, enforced the rights conferred on persons by the law; e. g. he gave juxta-tabular possession to the testamentary heir, § 36, or contra-tabular possession to praetermitted children, 2 § 125, or ab intestato possession to the suus heres or the agnate, § 37.

(2) He also gave possession to persons on whom the law had conferred no rights, that is, he supplemented the law; e.g. in default of sui heredes and agnates he granted ab intestato possession to cognates; he gave juxta-tabular possession to the devisee under a will invalid at Civil law, because the testator had been incapacitated at some period between the execution of his will and his decease: this possession, however, was ineffective (sine re) against

any person entitled ab intestato by the Civil law, 2 § 149, and Ulpian, 23, 6.

(3) He sometimes gave possession adverse to rights which the law had conferred on other persons, that is, he contradicted or corrected the law; e. g. he gave juxta-tabular possession to the devisee under a will invalid at Civil law, from want of mancipation or nuncupation, 2 § 149. He gave juxta-tabular possession to the afterborn stranger (postumus alienus), Inst. 3, 9, pr. who, as an uncertain person, could not be instituted by the Civil law, 2 § 242; and he gave contra-tabular possession to the emancipated child passed over in silence by a testator, 2 § 135.

As in the two latter functions of supplementing and correcting the law, the praetor did what is elsewhere performed by courts of equity, we have sometimes translated the contrasted terms heres and bonorum possessor by the terms 'legal successor' and 'equitable successor.'

The equitable or praetorian successor could not sue or be sued by the direct actions of the Civil law, but only by fictitious actions, 4 § 34. The claim of a succession founded on a title at Civil law was called hereditatis petitio; a claim founded on a purely praetorian title, e. g. cognation, was pursued by the Interdict Quorum bonorum, or, in the latest period, by possessoria hereditatis petitio, Dig. 5, 5, 1. Such at least is Savigny's view, who makes no essential difference between the Interdict Quorum bonorum and Possessoria hereditatis petitio. According to Vangerow, § 509, the Interdict was confined to the provisional purpose of obtaining Possession: and Possessoria hereditatis petitio was the means of claiming the inheritance when a claimant (e. g. cognatus or emancipatus) had a merely praetorian title; as Hereditatis petitio was the means of claiming the civil inheritance. Accordingly the Interdict could not be brought, like Hereditatis petitio, against debtors to the inheritance; but only against possessors of corporeal hereditaments. Interdicto Quorum bonorum debitores hereditarii non tenentur, sed tantum corporum possessores, Dig. 4, 3, 2, 2. Debtors would be pursued by Possessoria hereditatis petitio, if they disputed the creditor's right of succession; by actiones fictitiae, 4 § 34, if this was admitted.

§ 33. The orders or grades or classes to whom the praetor successively granted bonorum possessio in intestacy were as follow:

(1) Children (liberi), including not only sui heredes, but also

emancipated children, § 26, on condition that the latter brought their goods into hotchpot (collatio bonorum), Dig. 37, 6. Children given in adoption were not admitted in this order, but in the third order of cognates, § 31.

(2) Statutory heirs (legitimi), i.e. all who were entitled to inherit under any statute; e.g. agnates who were entitled under the Twelve Tables; mothers, who were entitled to succeed their children under the Sc. Tertullianum; children, who were entitled to succeed their mothers under the Sc. Orphitianum; and sui heredes who had repudiated or omitted to demand possession as members of the first order within the interval allowed, namely, a year.

(3) Next of kin (proximi cognati) including those who had neglected to claim in the first or second order.

(4) Husband and wife, when the wife is not in manu. A wife in manu would be quasi daughter and therefore sua heres and entitled to succeed with liberi in the first order.

These various grades of title are called unde liberi, unde legitimi, unde cognati, unde vir et uxor, phrases which properly denote those articles of the edict in which these classes are summoned to the succession: ea pars edicti unde liberi vocantur, &c., but are used by Roman lawyers as epithets of intestate bonorum possessio.

The degrees of cognation in a direct line are the number of generations that separate a descendant from an ascendant: to compute the degrees of collateral cognation we must add the degrees of direct cognation. Thus a man is one degree from his father, and therefore two from his brother and three from his nephew. He is two degrees from his grandfather, and therefore three from his uncle and four from his first cousin or cousin german (consobrinus). He is three degrees from his great-grandfather, and therefore four from his great-uncle and five from his great-uncle's son (propior sobrino) and six from his second cousin (sobrinus), that is, his great-uncle's grandson, for second cousins are the children of first cousins. He is seven degrees from his second cousin's children, and this is the only case in which the seventh degree of cognation was recognized as giving a title to succeed in intestacy, the law only recognizing in other lines the sixth degree of cognation. In English law collateral relationship is a title to inheritance or succession without any limit.

§ 36. Originally the person entitled to the praetorian succession was required to address a formal demand to the magistrate: but

under Justinian any signification of intention to accept the succession was sufficient without a demand. The interval allowed for this signification of intention (agnitio) to a parent or child of the defunct was a year, to other claimants a hundred days. If a person in a superior order or degree omitted to signify his acceptance in the interval allowed, the succession then devolved to the next order or degree. If the person who thus omitted to signify acceptance had only a praetorian title to the succession, his right was entirely forfeited by the omission; but if he was entitled at civil law he could evict the bonorum possessor, who accordingly was said to have only a nugatory or ineffective possession (sine re).

§ 38. We have already seen that the devisee under an unauthorized will of a female, though he obtained juxta-tabular possession, might be evicted by the person entitled as agnate, 2 § 119, and that a devisee under a praetorian will might be evicted by a devisee under a prior civil will or by a person entitled as agnate, unless the sole informality of the praetorian will, which rendered it invalid as a civil will, was the omission of mancipation or nuncupation, 2 § 149.

DE SUCCESSIONE LIBERTORUM CIVIUM ROMANORUM.

§ 39. Nunc de libertorum bonis videamus.

§ 40. Olim itaque licebat liberto patronum suum in testamento praeterire: nam ita demum lex XII tabularum ad hereditatem liberti vocabat patr*on*um, si intestatus mortuus esset libertus nullo suo herede *re*licto. itaque intestato quoque mortuo liberto, si is suum heredem reliquerat, nihil in bonis eius patrono iuris erat. et si quidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla videbatur esse querella; si vero vel adoptivus filius filiave, vel uxor quae in manu esset sua heres esse*t*, aperte ini*qu*um erat nihil iuris patrono superesse.

§ 41. Qua de causa postea Praetoris edicto haec iuris iniquitas emendata est. sive enim faciat testamentum libertus, iubetur ita tes-

§ 39. Succession to freedmen next demands our notice.

§ 40. Freedmen were originally allowed to pass over their patron in their testamentary dispositions. By the law of the Twelve Tables the inheritance of a freedman only devolved on his patron when he died intestate and without leaving a self-successor. If he died intestate but left a self-successor, the patron was excluded, and if the self-successor was a natural child, this was no grievance; but if the self-successor was an adoptive child or a wife in the hand, it was hard that they should bar all claim of the patron.

§ 41. Accordingly, at a later period, the praetor's edict corrected this injustice of the law. If a freedman makes a will, he is commanded

tari, ut patrono suo partem dimidiam bonorum suorum relinquat; et si aut nihil aut minus quam partem dimidiam reliquerit, datur patrono contra tabulas testamenti partis dimidiae bonorum possessio. si vero intestatus moriatur, suo herede relicto adoptivo filio, *vel* uxor*e* quae in manu ipsius esset, vel nuru quae in manu filii eius fuerit, datur aeque patrono adversus hos suos heredes partis dimidiae bonorum possessio. prosunt autem liberto ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habet, *sed* etiam emancipati et in adoptionem dati, *si* modo aliqua ex parte heredes scripti *sint*, *aut praeteriti con*tra tabulas testamenti bonorum possessionem ex edicto petierint: nam exheredati nullo modo repellunt patronum.

to leave a moiety of his fortune to his patron; and if he leaves him nothing, or less than a moiety, the patron can obtain contra-tabular possession of a moiety from the praetor. If he die intestate, leaving as self-successor an adoptive son or a wife in his hand or a son's wife in the hand of his son, the patron can obtain even against these self-successors intestate possession of a moiety from the praetor. The freedman is enabled to exclude the patron if he leaves natural children, whether in his power at the time of his death or emancipated or given in adoption, provided he leaves them any portion of the succession, or that, being passed over in silence, they demand contra-tabular possession in pursuance of the edict; for, if they are disinherited, they do not avail to bar the patron.

§ 42. Postea lege Papia aucta sunt iura patronorum quod ad locupletiores libertos pertinet. Cautum est enim ea lege, ut ex bonis eius qui sestertiorum *nummorum centum* mili*um plurisve* patrimoni*um reliquer*it, et pauciores quam tres liberos habebit, sive is testamento facto sive intestato mortuus erit, virilis pars patrono debeatur. itaque cum unum filium unamve filiam heredem reliquerit libertus, perinde pars dimidia patrono debetur, *ac si* sine ullo filio filiave moreretur; cum vero d*uos* duasve heredes reliquerit, tertia pars debetur; si tres relinquat, repellitur patronus. [*linea vacua.*]

§ 42. At a still later period the lex Papia Poppaea augmented the rights of the patron against the estate of more opulent freedmen. By the provisions of this law whenever a freedman leaves property of the value of a hundred thousand sesterces and upwards, and not so many as three children, whether he dies testate or intestate, a portion equal to that of a single child is due to the patron. Accordingly, if a single son or daughter survives, half the estate is claimable by the patron, just as if the freedman had died childless; if two children inherit, a third of the property belongs to the patron; if three children survive, the patron is excluded.

§ 43. In bonis libertinarum nullam iniuriam antiquo iure patiebantur patroni. cum enim hae in pat*ro*norum legitima tutela essent, non aliter scilicet testamentum facere poterant quam patrono auctore. itaque sive auctor ad testamentum faciendum factus *erat*, *neque tantum*,

§ 43. In successions to freedwomen no wrong could possibly be done the patron under the primitive law: for, as the patron was statutory guardian of the freedwoman, her will was not valid without his authorization, so that, if he authorized a will under which he did not

quantum vellet, testamento sibi relic*tum erat, de se queri debebat, qui id a liber*ta imp*etrare* potu*erat.* s*i v*ero auctor *ei factus* non erat, *etiam tut*ius *hereditatem* morte *eius capie*bat; *nam neque suum heredem liberta relinquebat qui* posset patronum a bonis *eius vindicandis re*pellere.

take as much as he chose, he had only himself to blame, for he might have imposed his own terms on the woman; if he did not authorize a will, he was assured of the whole succession, for a woman could have no self-successor to bar the claim of the patron.

§ 44. Sed postea lex Papia *cum* quattuor liberorum iure libertinas tutela patronorum liberaret et eo modo *inferret, ut iam sine patroni tu*toris auctor*itate testari possent, prospexit, ut pro numero liberorum quos superstites liberta* habuerit virilis pars patrono debeatur . . . ex bonis eius, qua*e* omnia . . . . iuris [2 *lin.*] ad patronum pertinet.

§ 44. But when at a subsequent period, by the enactment of the lex Papia, four children were a title that released a freedwoman from the guardianship of her patron, so that his authorization ceased to be necessary to the validity of her will, the same law enacted that a portion of her estate equal to that of a single child should always be due to the patron.

§ 45. *Quae* autem diximus de patrono, eadem intellegemus et de *filio pat*roni, *item* de n*epote ex filio, et de* prone*pote ex nepote fili*o *nato* pro*gn*ato.

§ 45. What has been said of the patron applies to a son of the patron, a grandson by a son, a great-grandson by a grandson by a son.

§ 46. *F*ilia vero patroni, i*tem neptis ex filio, e*t pron*eptis ex* nepot*e f*ilio n*ato* p*rognata,* quamvis ide*m ius habeant, quod l*ege XII tabularum patrono datum est, P*rae*t*or tamen vocat tantum masculini* sexu*s* patron*orum* li*beros: sed filia, ut contra tabulas* testamenti libert*i vel* ab *intestato contr*a *filium* adoptivum *vel uxorem nurumve dimidiae part*is bonorum possessionem petat, trium liberorum iure lege Papia consequitur: aliter hoc ius non habet.

§ 46. Although a daughter of a patron, a granddaughter by a son, a great-granddaughter by a grandson by a son have identical rights under the statute of the Twelve Tables with the patron, the praetorian edict only calls the male issue to the succession: but a daughter of the patron can override a will or the intestate claim of an adoptive child, or a wife, or a son's wife, and demand contra-tabular or intestate possession of a moiety under the title of mother of three children by the provisions of the lex Papia; otherwise she has no title.

§ 47. Se*d* ut ex bonis libert*ae suae* quattuor liberos hab*entis vi*r*i*lis *pars ei deberetur,* liberorum *quidem iure non est* con*prehens*um, ut quidam putant. se*d* tamen intestata liberta mortua, verba legis Papiae faciunt, ut ei virilis pars debeatur. si vero testamento facto mortua sit liberta, tale ius ei datur, quale datum

§ 47. In the succession to a freedwoman mother of four children, a patron's daughter is not always entitled as mother of three children to the portion of a child, as some suppose: but, if the freedwoman die intestate, the words of the lex Papia give her the portion of a child; if the freedwoman die

est *patronae tribus liberis honoratae*, ut *proinde bonorum possessionem habeat, quam patronus* liberique contra tabulas *testamenti* liberti habent: quamvis parum diligenter ea pars legis scripta sit.

testate, the patron's daughter only has the same title as a freeborn patroness mother of two children; the same title to contra-tabular possession, that is, as the praetorian edict confers on a patron and his son in respect of the heritage of a freedman, though this portion of the law is carelessly written.

§ 48. Ex *h*is apparet e*x*traneos heredes patrono*r*um longe remot*um ab omni eo* iure iri, quod *vel* in *in*testatorum bonis *vel contra* tab*u*las testamenti patrono competit.

§ 48. It is apparent that the external heir of a patron is utterly destitute of title by patronage, whether a freedman die testate or intestate.

§ 49. Patronae olim ante legem Papiam hoc solum ius habebant in bonis liberto*rum*, quod etiam patronis *e*x lege XII tabularum datum est. nec *enim* ut contra tabulas tes*ta*menti, in *quo praeteritae* eran*t*, vel ab intestato contra filium adoptivum vel uxorem nurumve bonorum possessionem par*tis* d*imidiae* peterent, Praetor si*mi*liter *ut* pa*trono* lib*erisque eius concessit.*

§ 49. Patronesses, before the lex Papia was passed, had only the same rights as patrons under the statute of the Twelve Tables: neither by contra-tabular possession against a will in which they are omitted, nor by intestate possession against the intestate claim of an adoptive child or a wife or a son's wife could they, like the patron or the patron's son, obtain a moiety of a heritage from the praetor.

§ 50. *Sed postea lex Papia* duo*bus liberis* honora*t*ae ingenuae patronae, libertinae tribus, eadem fere iura dedit quae ex edicto Praetoris patroni habent. trium vero liberorum iure honoratae ingenuae patronae ea iura dedit quae per eandem legem patrono data sunt: libertinae autem patronae non idem iuris praestitit.

§ 50. But subsequently by the lex Papia two children entitle a freeborn patroness, three children an emancipated patroness, to nearly the same rights as the edict confers on a patron; and three children entitle a freeborn patroness to the rights which the lex Papia confers on a patron: an emancipated patroness is never so entitled.

§ 51. Quod autem ad libertinarum bona pertinet, si quidem intestatae decesserint, nihil novi patronae liberis honoratae lex Papia praestat, itaque si neque ipsa patrona, neque liberta *capite* d*eminuta* sit, ex lege XII tabularum ad eam hereditas pertinet, et excluduntur libertae liberi; quod iuris est etiamsi liberis honorata non sit patrona: numquam enim, sicut supra diximus, feminae suum heredem habere possunt. si vero vel huius vel illius capitis deminutio interveniat, rursus

§ 51. As to the successions of freedwomen who die intestate, no new right is conferred on a patroness through the title of children by the lex Papia; accordingly, if neither the patroness nor the freedwoman has descended in status, the law of the Twelves Tables transmits the succession to the patroness, and excludes the freedwoman's children, even when the patroness is childless; for a woman, as before remarked, can never have a self-successor: but if either of them has

liberi libertae excludunt patronam. quia legitimo iure *capitis deminutione* perempto evenit, ut liberi libertae cognationis iure potiores habeantur.

descended in status, the children of the freedwoman exclude the patroness, because her statutory title is obliterated by the descent in status, and the children are admitted as next of kin.

§ 52. Cum autem testamento facto moritur liberta, ea quidem patrona quae liberis honorata non est nihil iuris habet contra libertae testamentum; *ei* vero quae liberis honorata sit, hoc ius tribuitur per legem Papiam quod habet ex edicto patronus contra tabulas liberti.

§ 52. When a freedwoman dies testate, a patroness not entitled by children has no right of contra-tabular possession: but a patroness entitled by children has the same right of contra-tabular possession conferred upon her by the lex Papia as the praetorian edict confers on the patron.

§ 53. Eadem lex patrona*e* filiae liberis honoratae .... patroni iura dedit; sed in huius persona etiam unius filii filiaeve ius sufficit.

§ 53. By the same law a patroness's daughter duly entitled by children has the rights of .... but in this case one son or daughter is a sufficient title.

§ 54. Hactenus omnia *ea* iura quasi per indicem tetigisse satis est: alioquin diligentior interpretatio propriis commentariis exposita est.

§ 54. This summary indication of the rules of succession to freedmen who have enjoyed the plenary franchise may suffice for the present occasion: a more detailed exposition is to be found in my separate treatise on this branch of law.

§ 54. The provisions of the lex Papia Poppaea respecting the rights of patroni filia and patrona are very intricate and obscure and require to be examined in detail.

Against the estate of a libertus the lex Papia Poppaea gave to patroni filia mother of three children the same rights as the praetorian edict had given to patronus; that is to say, whether libertus die testate or intestate, unless his devisees or heirs are sui heredes naturales (not a wife nor an adoptive child), filia patroni mother of three children is entitled to a moiety of the estate.

Against the estate of liberta who dies testate, filia patroni mother of three children has the edictal rights of patronus against the estate of libertus. This improved the position of filia patroni, for, not having the tutela libertae like patronus, 1 § 195, she could not under the Twelve Tables exercise any control over the testamentary dispositions of liberta by withholding her auctoritas. Filia patroni has this right even against the estate of a testate liberta mother of four children, but in this case it would amount to little,

being merely the right to a moiety in the improbable contingency of the freedwoman devising her estate away from her children.

Against the estate of liberta mother of four children who dies intestate filia patroni has the Papian rights of the patronus in the same case (assuming, what is not certain, that the Papian rights of patronus were the same whether the freedwoman died testate or intestate), i.e. a right to the share of a child. In this solitary case the Papian rights of filia patroni would be measured not by the edictal but by the Papian rights of patronus.

Patrona mother of three children had against the estate of libertus the Papian rights of patronus; patrona mother of two children had the same rights as filia patroni, i.e. the edictal rights of patronus.

Against the estate of liberta who dies testate patrona mother of (two ?) children has the same rights as filia patroni, i.e. the edictal rights of patronus against the estate of libertus. It is not stated whether patrona mother of three children had the Papian rights of patronus against the estate of liberta mother of four children who dies testate, though we might have conjectured this from her rights against the estate of libertus.

The rights of patrona mother of children against the estate of intestate liberta mother of four children was a casus omissus in the lex Papia Poppaea, apparently, from the inadvertence of the legislator, and accordingly was governed by the provisions of the Twelve Tables. Except on this point the rights of patrona mother of two children were the same as the rights of filia patroni mother of three children. On this point, then, it appears that patrona had greater rights against the estate of intestate liberta mother of four children than patronus, for patronus (assuming, as above, that he had the same rights in testacy and intestacy) was only entitled to the share of a child, whereas patrona was entitled to the whole inheritance. The right, however, of patrona was more precarious, for, descending from the Twelve Tables, it might be extinguished by change of status, whereas the rights of patronus and filia patroni, being derived from the lex Papia Poppaea, were unaffected by change of status. Novae hereditates legitimae capitis deminutione non pereunt, sed illae solae quae ex lege duodecim tabularum deferuntur, Inst. 3, 4, 2. 'The newly introduced rights of succession of the statutory class are not extinguished by change of status like those conferred by the law of the Twelve Tables.'

§ 54. Gaius wrote a treatise in fifteen books, Ad leges Juliam et

Papiam, from which there are thirty extracts in the Digest; another in ten books, Ad edictum urbicum; and another in three books, De manumissionibus: to any of which he may allude.

DE BONIS LIBERTORUM LATINORUM.

§ 55. Sequitur ut de bonis Latinorum libertinorum dispiciamus.

§ 56. Quae pars iuris ut manifestior fiat, admonendi sumus, de quo alio loco diximus, eos qui nunc Latini Iuniani dicuntur olim ex iure Quiritium servos fuisse, sed auxilio Praetoris in libertatis forma servari solitos; unde etiam res eorum peculii iure ad patronos pertinere solita est: postea vero per legem Iuniam eos omnes quos Praetor in libertatem tuebatur liberos esse coepisse et appellatos esse Latinos Iunianos: Latinos ideo, quia lex eos liberos perinde esse voluit, atque si essent cives Romani ingenui qui ex urbe Roma in Latinas colonias deducti Latini coloniarii esse coeperunt: Iunianos ideo, quia per legem Iuniam liberi facti sunt, etiamsi non cives Romani. *qua*re legis Iuniae lator, cum intellegeret futurum, ut ea fictione res Latinorum defunctorum ad patronos pertinere desinerent, ob i*d quod neque* u*t* servi *d*ecederent, ut possent *iure* *p*ecul*ii* res eorum ad patronos pertinere, neque liberti Latini hominis bona possent manumissionis iure ad patronos pertinere, necessariu*m existimavit*, ne beneficium istis datum in iniuriam *patrono*rum converteretur, cavere, u*t bona horum liberto*rum proinde ad manumissores pertinerent, ac si lex lata non esset. itaque iure quodammodo peculii bona Latinorum ad manumissores *eorum* pertinent.

§ 55. We proceed to the successions of Latini Juniani.

§ 56. To understand this branch of law we must recollect what has been already mentioned (1 § 22), that those who are called Latini Juniani were originally slaves by law of the Quirites, though maintained by the praetor's protection in a condition of quasi freedom, so that their possessions belonged to their patrons by the title of peculium. At a more recent period [A.D. 19], when the lex Junia Norbana was enacted, those whom the praetor had protected in quasi freedom became legally free, and were called Latini Juniani: Latini, because the law assimilated their freedom to that of freeborn citizens of Rome who, on quitting Rome for a Latin colony, became Latin colonists; Juniani, because the lex Junia gave them liberty without citizenship: and as the author of the lex Junia foresaw that the effect of this fiction would be that the goods of deceased Latini Juniani would cease to belong to the patron, as they would not be slaves at the time of their death, so that their goods should belong to the patron by the title of peculium, and they would not devolve to him by title of manumission; he deemed it necessary, to prevent the favour to these freedmen from becoming a wrong to the patron, to provide that their goods should belong to the manumitter in the same way as if the law had not been enacted. Consequently the goods of Latini Juniani belong to their manumitters by the title of quasi peculium.

§ 57. *Unde evenit, ut multum* differant *ea* iura quae in bonis Latinorum ex lege Iunia constituta sunt, ab his quae in hereditate civium Romanorum libertorum observantur.

§ 58. Nam civis Romani liberti hereditas ad extraneos heredes patroni nullo modo pertinet: ad filium autem patroni nepotesque ex filio et pronepotes ex nepote *filio nato prog*natos omnimodo pertinet, etiamsi *a* parente fuerint exheredati: Latinorum autem bona tamquam peculia servorum etiam ad extraneos heredes pertinent, et ad liberos manumissoris exheredatos non pertinent.

§ 59. Item *civis Romani liberti* hereditas ad duos pluresve patronos aequaliter pertinet, licet dispar in eo servo dominium habuerint: bona vero Latinorum pro ea parte pertinent pro qua parte quisque eorum dominus fuer*it*.

§ 60. Item in hereditate civis Romani liberti patronus alterius patroni filium excludit, et filius patroni alterius patroni nepotem repellit: bona autem Latinorum et ad ipsum patronum et ad alterius patroni heredem simul pertinent pro qua parte ad ipsum manumissorem pertinerent.

§ 61. Item si unius patroni tres forte liberi sunt, et alterius unus, hereditas civis Romani liberti in capita dividitur, id est tres fratres tres portiones ferunt et unus quartam: bona vero Latinorum pro ea parte ad successores pertinent pro qua parte ad ipsum manumissorem pertinerent.

§ 57. Accordingly there are wide differences between the title to the goods of Latini Juniani under the lex Junia and the title to the successions of freedmen possessed of the plenary franchise.

§ 58. When a freedman possessed of the full franchise dies, an external heir of the patron has no claim on his succession, while a son of the patron, a grandson by a son a great-grandson by a grandson by a son, have an indefeasible claim even after disinheritance; whereas, when a Latinus Junianus dies, his goods are transmitted to his patron's external heir, and the claim of the patron's children is barred by disinheritance.

§ 59. A freedman with the plenary franchise leaves several patrons his cosuccessors in equal portions, in however unequal proportions they had been his proprietors; whereas the goods of a Latinus Junianus belong to his patrons in the ratio of the property which they had in him when he was a slave.

§ 60. In the succession to a freedman who had the plenary franchise, one patron bars another patron's son, and a son of one patron bars another patron's grandson; whereas the goods of a Latinus Junianus belong to a patron and another patron's heir in the same proportions in which they would have belonged to the two patrons.

§ 61. If one patron leave three sons, and another patron one, the succession of a freedman who had the plenary franchise is divided by the number of individuals; that is to say, every one takes an equal portion; whereas the goods of a Latinus Junianus belong to the sons of the patrons, not in their own right, but in right of representation; that is to say, in the proportion in which they would have belonged to the original manumitters.

§ 62. Item si alter ex *iis* patronis suam partem in hereditatem civis Romani liberti spernat, vel ante moriatur quam cernat, tota hereditas ad alterum pertinet: bona autem Latini pro parte decedentis patroni caduca fiunt et ad populum pertinent.

§ 62. If one patron renounce his part in the inheritance of a freedman who had the plenary franchise, or die before acceptance, the whole inheritance belongs to the other; but the goods of a Latinus Junianus that would have descended to a deceased patron are vacant and escheated to the state.

§ 63. Postea Lupo et Largo Consulibus senatus censuit, ut bona Latinorum primum ad eum pertinerent qui eos liberasset; deinde ad liberos eorum non nominatim exheredatos, uti quisque proximus esset; tunc antiquo iure ad heredes eorum qui liberassent pertinerent.

§ 63. At a later period, when Lupus and Largus were consuls, the senate decreed that the goods of a Latinus Junianus should belong in the first place to the manumitter, in the next to such issue of the patron as are not individually disinherited in the order of their proximity, and, in default of these, should belong by the ancient rule of devolution to the external heir of the manumitter.

§ 64. Quo senatusconsulto quidam *id* actum esse putant, ut in bonis Latinorum eodem iure utamur, quo utimur in hereditate civium Romanorum libertinorum; idemque maxime Pegaso placuit. quae sententia aperte falsa est. nam civis Romani liberti hereditas numquam ad extraneos patroni heredes *pertinet: bona autem* Latinorum etiam hoc ipso senatusconsulto non obstantibus liberis manumissoris etiam ad extraneos heredes pertinent. item in hereditate civis Romani liberti liberis manumissoris nulla exheredatio no*cet*: in bonis Latinorum *autem no*cere nominatim factam exheredationem *ip*so senatusconsulto significatur. Verius est ergo hoc solum eo senatusconsulto actum esse, ut manumissoris liberi qui nominatim exheredati non sint praeferantur extraneis heredibus.

§ 64. The effect of this senatusconsult is, according to some authorities, that the goods of a Latinus Junianus are acquired by the same title as the succession of a freedman who has enjoyed the full franchise, and this was the doctrine of Pegasus: but this opinion is clearly erroneous, for a freedman who has the full franchise never transmits his succession to an external heir of his patron; whereas the goods of a Latinus Junianus, by the express terms of the senatusconsult, in default of children of the manumitter devolve on his external heir. Again, in the succession of a freedman who had the full franchise, the children of the manumitter are not barred by any form of disinheritance; whereas, in respect of the goods of a Latinus Junianus, they are barred by individual disinheritance by the express terms of the senatusconsult. The only true effect, then, of the senatusconsult is, that the manumitter's children in the absence of individual disinheritance take precedence of external heirs.

§ 65. *Itaque* et emancipatus filius patroni praeteritus, quamvis contra tabulas testamenti parentis sui bonorum possessionem non petierit, tamen extraneis heredibus in bonis Latinorum potior habetur.

§ 65. Accordingly, an emancipated son of the patron who is passed over in silence by his father, though he omits to impeach his father's will and demand contratabular possession, takes precedence of an external heir in respect of the goods of a Latinus Junianus.

§ 66. Item filia ceteri*que* quos *ex*heredes licet iure civili *facere inter ceteros, quamvis id suf*ficia*t, ut* ab omni *hereditate patr*is sui *s*ummove*antur*, tamen in bonis Latinorum, nisi nominatim a parente fuerint exheredati, potiores erunt extraneis heredibus.

§ 66. Again, a daughter and other issue who can be disinherited at civil law in a mass and thereby effectively barred from all the succession of their parent, in respect of the goods of a Latinus Junianus, in default of individual disinheritance, have priority over an external heir.

§ 67. Item ad *li*beros qui *ab* hereditate parentis se abstinuerunt, *bona Latinorum pertinent, quamvis alieni habeantur a paterna hereditate, quia ab* hereditate exheredati nullo modo dici possunt, non magis quam qui testamento silentio praeteriti sunt.

§ 67. Children who abstain from the succession of their parent are entitled to the goods of his Latinus Junianus in spite of their abstention, because they cannot be said to be disinherited any more than children who are passed over by a testator in silence.

§ 68. *Ex his* omnibus satis illu*d* apparet, si is qui Latinum fecerit, ... [*desunt* 25 *lin.*]

§ 68. From all these points it is sufficiently apparent that he who makes a Latinus Junianus....

§ 69. .... *pu*tant ad eos pertinere, qui*a* nullo interveniente extraneo herede senatusconsulto lo*cus* non est.

§ 69. .... hold them entitled in unequal portions, because in the absence of an external heir the senatusconsult has no application.

§ 70. *Sed* si cum liberis suis etiam extraneum heredem patronus reliquerit, *Ca*elius Sabinus ait tota bona pro virilibus partibus ad liberos defuncti pertinere, quia cum extrane*us* heres intervenit, non habet lex Iunia locum, sed senatusconsultum. Iavolenus autem ait tantum eam partem ex senatusconsulto liberos patroni pro virilibus partibus habituros esse, quam extranei heredes ante senatusconsultum lege Iunia habituri essent, reliquas vero partes pro hereditariis partibus ad eos pertinere.

§ 70. If the children of the patron are joint heirs with a stranger, Caelius Sabinus holds, that the totality of the goods of a Latinus Junianus devolves in equal portions to the children, because the existence of an external heir brings them within the senatusconsult instead of the lex Junia. According to Javolenus, only that part will devolve under the senatusconsult in equal portions to the children of the patron to which, before the senatusconsult was passed, the external heir would have been entitled under the lex Junia, and the residue will devolve to them in the proportion of their shares in their father's succession.

§ 71. Item quaeritur, an hoc senatusconsultum ad eos patroni liberos pertineat qui ex filia nep*te*ve procreantur, id est ut nepos meus ex filia potior sit in bonis Latini mei quam extraneus heres. item *an* ad maternos Latinos hoc senatusconsultum pertineat, quaeritur, id est ut in bonis Latini materni potior sit patronae filius quam heres extraneus matris. Cassio placuit utroque casu locum esse senatusconsulto. sed huius sententiam plerique inprobant, quia senatus de his liberis patronarum nihil sentiat, qui aliam familiam sequerentur. idque ex eo adparet, quod nominatim exheredatos summo*v*et: nam videtur de his sentire qui ex*h*eredari a parente solent, si heredes non instituantur; neque autem matri filium filiamve, neque avo materno nepotem neptemve, si eum eamve heredem non instituat, exheredare necesse est, sive de iure civili quaeramus, sive de edicto Praetoris quo praeteritis liberis contra tabulas testamenti bonorum possessio promittitur.

§ 71. It is a further question, whether this senatusconsult extends to children born of a daughter or granddaughter of a patron, so that in respect of the goods of a Latinus Junianus a grandson by a daughter will take precedence of an external heir. Again, whether a maternal Latinus Junianus is within the senatusconsult, so that in respect of a Latinus Junianus, manumitted by a mother, precedence is given to the patroness' son over an external heir of the mother. Cassius held that both cases are within the scope of the senatusconsult; but his opinion is generally rejected on the ground that the senate did not intend to benefit patronesses' sons; persons, that is, who are members of a different family; as appears from its making individual disinheritance a bar; for herein the senate appears to contemplate those who must be disinherited by their parent in default of institution. Now a mother need not disinherit her child, nor a grandmother a grandchild, in default of institution, either by the civil law or by that part of the praetorian edict which promises contra-tabular possession to children passed over by a testator in silence.

§ 72. Aliquando tamen civis Romanus libertus tamquam Latinus moritur, veluti si Latinus salvo iure patroni ab Imperatore ius Quiritium consecutus fuerit: nam *ita* divus Tr*a*ianus constituit, si Latinus invito vel ignorante patrono ius Quiritium ab Imperatore consecutus sit. quibus casibus dum vivit iste libertus, ceteris civibus Romanis libertis similis est et iustos liberos procreat, moritur autem Latini iure, nec ei liber*i* eius heredes *es*se possunt; et in hoc tantum habet testamenti factionem, uti patronum, heredem instituat, eiqu*e*, si heres

§ 72. Sometimes a freedman who has enjoyed the full franchise dies as a Latinus Junianus; for instance, a Latinus Junianus who has obtained an imperial grant of Quiritary status without prejudice to the rights of his patron: for by a constitution of the emperor Trajan a Latinus Junianus who obtains an imperial grant of Quiritary status without the consent or knowledge of his patron resembles during his lifetime other fully enfranchised freedmen, and procreates lawful children, but dies with the status of a Latinus Junianus, leaving no

esse noluerit, alium substituere possit.

children that can inherit; and has only this amount of testamentary capacity that he may institute his patron heir, and name a substitute to him in case of his renouncing the inheritance.

§ 73. Et quia hac constitutione videbatur effectum, ut numquam isti homines tamquam cives Romani morerentur, quamvis eo iure postea usi essent, quo vel ex lege *Aelia* Sentia vel ex senatusconsulto cives Romani essent: divus Hadrianus iniquitate rei motus auctor fuit senatusconsulti *f*aciundi, ut qui ignorante vel recusante patrono ab Imperatore ius Quiritium consecuti essent, si eo iure postea usi essent, quo ex lege Aelia Sentia vel ex senatusconsulto, si Latini mansissent, civitatem Romanam consequerentur, proinde ipsi haberentur, ac si lege Aelia Sentia vel senatusconsulto ad civitatem Romanam pervenissent.

§ 73. But as the effect of this constitution seemed to be, that such a person could never die in possession of the plenary franchise, even though he subsequently acquired the title to which the lex Aelia Sentia or the senatusconsult (1 § 31) annexes the right of Roman citizenship, the emperor Hadrian, to mitigate the harshness of the law, passed a senatusconsult, that a freedman, who obtained from the emperor a grant of Quiritary status without the knowledge or consent of his patron, on subsequently acquiring the title to which the lex Aelia Sentia or the senatusconsult, if he had remained a Latinus Junianus, would have annexed the rights of Roman citizenship, should be deemed to have originally acquired Quiritary status by the title of the lex Aelia Sentia or the senatusconsult.

DE BONIS LIBERTORUM DEDITICIORUM.

§ 74. Eorum autem quos lex Aelia Sentia dediticiorum numero facit, bona modo quasi *civium Romanorum* lib*er*torum, modo quasi Latinorum ad patronos pertinent.

§ 74. Those who under the lex Aelia Sentia are quasi surrendered leave their goods to their patrons sometimes like freedmen fully enfranchised, sometimes like Latini Juniani.

§ 75. Nam eorum bona qui, si *i*n aliquo vitio non essent, manumissi cives Romani futuri essent, quasi civium Romanorum patronis eadem lege tribuuntur. non tamen hi habent etiam testamenti factionem; nam id pl*e*risque placuit, nec inmerito: nam incredibile videbatur pessim*ae* condicionis hominibus voluisse legis latorem testamenti faciundi ius concedere.

§ 75. Those of them who, but for some offence, would have obtained on manumission the plenary franchise leave their goods to their patrons like fully enfranchised freedmen by the provision of the above mentioned statute; but, according to the prevalent and better opinion, they cannot make a will; for it seems incredible that the most abject order of freedmen should have been intended by the legislator

to enjoy the power of testamentary disposition.

§ 76. Eorum vero bona qui, si non in aliquo vitio essent, manumissi futuri Latini essent, proinde tribuuntur patronis, ac si Latini decessissent. nec me praeterit non satis in ea re legis latorem voluntatem suam verbis expressisse.

§ 76. The goods of those who, but for some offence, would have become on manumission Latini Juniani devolve to their patrons as the goods of Latini Juniani, though, as I am aware, the legislator has not expressed his intention in this matter in terms as unequivocal as might be desired.

§ 59. It was an arbitrary rule of Roman jurisprudence that rights of patronage were not divisible in unequal portions (placuit nullam esse libertorum divisionem, Dig. 37, 14, 24), that is, that several joint proprietors of a slave in unequal portions acquired by his manumission equal rights as joint patrons against his succession.

§ 60. The rights of patrons were modelled on those of agnates, and we know that only the nearest agnate was entitled to succeed. Therefore on the decease of one of several joint patrons his rights accrued to the remainder by survivorship. But the peculium of a slave belongs to his coproprietors in the ratio of their property, and on the decease of one, his rights do not accrue to the coproprietors, but are transmitted to the representatives of the deceased.

§ 63. The Sc. Largianum was passed under the emperor Claudius, A.D. 42.

§ 69. The Sc. Largianum giving a successoral right to the children of the patron, put them all on a footing of equality like manumitting joint proprietors, § 59, but it only took effect when a stranger was appointed heir or coheir; if then a patron left his whole inheritance to his children, but in unequal portions, their rights to the succession of a Latinus Junianus would be governed by the older law, and would be proportionate to their shares in their father's succession.

§ 75. Ulpian gives as a reason why Dediticius could not make a will his want of citizenship both at Rome and in every other state: Is qui dediticiorum numero est testamentum facere non potest, quoniam nec quasi civis Romanus testari potest, cum sit peregrinus, nec quasi peregrinus, quoniam nullius certae civitatis civis est, ut secundum leges civitatis suae testetur, 20, 14. This requires some explanation; and the explanation may serve to illustrate all those passages of Gaius, e.g. 1 § 92, where he alludes to the laws of civitates peregrinae.

At the close of the republic, and during the first centuries of the empire, all Italy, with the exception of Rome, was composed of a number of townships; each with its own territorial limits, and each possessed of its own constitution, magistrates, jurisdiction, and, to a certain extent, legislation. In the lex Julia municipalis, preserved on the tabula Heracleensis, these townships are called Coloniae when they had been founded as colonies from Rome, Municipia when they traced their existence to some other origin. The Provinces, though originally very variously constituted, were gradually assimilated in condition to Italy and its towns: so that finally the whole empire was composed of municipalities, and almost all of its free inhabitants were either citizens of Rome or of some local and inferior community.

The generic denomination of these communities, whether Italian or Provincial, was Civitas or Respublica. The term Municipium was sometimes used in this generic sense; but was more commonly used in a specific sense as opposed to Colonia. Municipes, however, is often used in the generic sense where we might have expected Municipium; as equivalent to Respublica or Civitas. It is also often used to signify generically, not a state or juristic person (municipium), but its individual members; i. e. as equivalent to cives, in speaking of any town but Rome: as the word Civis, from its habitual opposition to Latinus and Peregrinus, had acquired a tendency to suggest civis Romanus. The area belonging to each town was called Regio or Territorium, and included under one jurisdiction all the Vici within its geographical limits.

Citizenship (civitas, patria, origo) in any municipality was producible by four causes: Municipem aut nativitas facit, aut manumissio, aut adoptio, D. 50, 1, 30, pr. Cives quidem origo, manumissio, allectio, vel adoptio; incolas vero domicilium facit, C. 10, 39, 7.

(1) Birth (origo, nativitas) was the commonest title; and hence the word origo is used as equivalent to civitas. Legitimate children had the civitas of their father; illegitimate of their mother. Some states had the privilege that legitimate children should have the civitas of the mother in addition to that of the father.

(2) Adoptio gave to the adopted child, in addition to his original civitas, that of his adoptive father.

(3) Manumissio, when perfect, gave to the freedman the civitas of his patronus.

(4) Allectio, election by the governing body of a community, admitted strangers to civitas.

It follows that a man might be a citizen of several states; of one by origo, another by adoptio, another by allectio. This may seem to be contradicted by Cicero: Duarum civitatum civis esse nostro jure civili nemo potest, Pro Balbo, 2: but Cicero is here speaking of independent sovereign states; not of the dependent states composing the organism of the Roman empire.

When the lex Julia municipalis had given Roman citizenship to all Italy, and an ordinance of Caracalla, subsequent to the time of Gaius, had extended it to all the Provinces, every member of any municipality had at least a double citizenship: he was citizen of Rome as well as of the smaller municipality: Omnibus municipibus duas esse censeo patrias, unam naturae, alteram civitatis . . . habuit alteram loci patriam, alteram juris, Cicero, De legibus, 2, 2. Roma communis nostra patria est, Modestinus, D. 50, 1, 33.

The principal effects of citizenship in a municipality were threefold:

(1) Obligation to bear certain burdensome municipal offices (munera);

(2) Subjection or obligation of submission to the municipal magistrates and tribunals, including liability as defendant to be sued before its courts (forum originis);

(3) Subjection to municipal laws, including the determination of a man's personal capacity—infancy, minority, majority, capacity of disposition, &c.—by the laws of the community in which he had civitas (lex originis).

In all these effects a man's Roman citizenship was of slight importance compared with his municipal citizenship. The burdens (munera) of the metropolitan city were provided for by arrangements peculiar to Rome. The liability of a defendant to be sued before a Roman forum was limited to the time when he happened to be resident in Rome, and then was subject to many exceptions, included under the general name of jus revocandi domum: and in any case of collision between the laws relating to personal capacity, the laws of Rome always yielded to those of the local patria or father town (lex originis).

In all the above consequences Domicil (domicilium, incolatus, domus) had an operation similar to civitas. Domicil is the place which a man has voluntarily chosen for his permanent residence, as

the central station of his fortunes, and the head-quarters of his dealings and dispositions: Incolas vero . . . domicilium facit. Et in eo loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde quum profectus est, peregrinari videtur, quo si rediit, peregrinari jam destitit, C. 10, 39, 7. 'Home is identical with Domicil; and Domicil is agreed to be the place where a man has established his household gods and the head-quarters of his transactions and obligations: the place which he will not leave except for a special purpose; absence from which makes him seem to be a stranger, and return to which makes him cease to be a stranger.' Sed de ea re constitutum esse (respondit), eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet suarumque rerum constitutionem fecisset, D. 50, 16, 203. 'It is undisputed that a man's home is the place where he is settled and has his counting-house (account-books) and the basis of his operations (or, centre of gravitation of his fortunes).'

A man was liable to munera of the city which he had chosen for a domicil as well as of that where he had the rights and duties of citizenship. Domicil, as well as Origo, constituted a man's General forum; that is, in any action in which a man was defendant, the plaintiff had the election whether he would sue him at his forum originis or forum domicilii. A man can only be governed by one Lex: and if he was citizen in any municipality, he was governed by lex originis; if he was nowhere citizen, he was governed by lex domicilii. [Domicilium originis, a monstrous combination of modern writers, ought to express the coincidence of Domicil and Fatherland, but is intended to express the paternal domicil (domicil of a man's father)].

The subversion of the Roman empire in the west abolished the importance of the Municipalities; and, with the exception of Switzerland where it still prevails, the doctrine of Origo disappeared from those countries which are still influenced by Roman jurisprudence. The doctrine of Domicilium still survives, at least as to Forum and Lex, in Private international law: what related to Munera shared the fate of the other political institutions of the empire. Savigny, §§ 350–359.

We may observe that the reason assigned by Ulpian for the incapacity of Dediticius to make a will, his want of patria, appears inadequate: for, if he had no patria, at least he had domicilium, and

we have seen that, in the absence of patria, a man's personal capacity was determined by his domicilium. We may infer that the equivalence of domicilium to patria—to say nothing of the modern maxim: Locus regit actum, 4 § 53, com., the ability of even temporary residence, as opposed to domicil, to give validity to the mere Form of a disposition—was not completely established, not at all events in favour of Dediticius, in the times of Gaius or even in those of Ulpian.

§ 76. The third class of freedmanship (dedititia libertas) had long been obsolete when it was formally abolished by Justinian, A.D. 530, Cod. 7, 5.

The second class (latinitas), under which the freedman relapsed into servitude at the moment of death, was also offensive to Roman feelings in the time of Justinian, and was by him formally abolished, the principal modes of creating latinitas being transformed into modes of acquiring quiritary status or civitas Romana, and the remainder being declared inoperative, Cod. 7, 6.

The rules of succession to intestate freedmen of the first class, the only class henceforth recognized, were immensely simplified by Justinian. He abolished all distinction between freedman and freedwoman, between patron and patroness, children of patron and children of patroness of either sex, treated adoptive children of the patron or freedman as strangers, and deprived patrons of their right to succeed before the children of a freedwoman; that is, he eliminated from the title to succession all the doctrines of agnation or the civil family: deprived patrons of their right of succession concurrently with the children of opulent freedmen; that is, reduced them to the rank of agnates, where they had been placed by the Twelve Tables, from that of sui heredes, to which they had been virtually promoted by subsequent legislation: and changed the remaining series of titles by patronage as defined by the praetorian edict in default of patrons and their children.

The praetorian edict had contained the following series of titles to bonorum possessio, or classes of successors to the estate of intestate freedmen:

(1) Unde liberi. The children of the deceased, whether under power, or emancipated, or given in adoption, had the first and highest title to succeed to the estate of their father.

(2) Unde legitimi. Patrons and their children occupy the second rank. As a freedman could have no agnates or cognates (agnation

and cognation being only traceable through a common ancestor, and Roman law taking no notice of servile relationship, Inst. 3, 6, 10) the Twelve Tables in default of sui heredes of the freedman, that is to say, in the rank corresponding to that which they gave to agnates in other successions, conferred the right of succeeding to the estate of a freedman on the patron and such children of the patron as continued in the civil family of their father.

(3) Tum quem ex familia (patroni proximum inveniam?). Failing the patron and the patron's children, the nearest agnates of the patron were entitled to succeed.

(4) Unde liberi patroni patronaeque et parentes eorum. Failing agnates of the patron, his cognates in an ascending or descending line were summoned to the succession.

(5) Unde vir et uxor.

(6) Unde cognati manumissoris. Failing the preceding titles, the patron's collateral cognates succeeded.

If no one succeeded under any of these titles, the estate of the deceased escheated to the treasury.

For this series of titles Justinian substituted one far simpler, the same nominally as that which governs succession to freemen, though with some necessary modifications of signification, and consisting of the following groups: (1) Unde liberi; (2) Unde legitimi; (3) Unde cognati; (4) Unde vir et uxor.

The first head includes all the natural descendants of the freedman or freedwoman, and excludes their adoptive children.

The second head entitles patrons and their natural children, whether in their civil family or not; that is to say, it entitles the patron and his children not, as formerly, in their character of supposed agnates of the freedman, but in the character of his supposed cognates.

The third head summons to the succession all the collateral cognates of the patron, but only to the fifth degree. The freedman himself, from the law's disregard of servile relationship, could no more have cognates than he could agnates.

The augmented rights which the lex Papia conferred on patrons against the estate of more opulent freedmen were abolished by Justinian, except in the case of their testacy. If a freedman possessed of a hundred aurei and upwards (this sum Justinian considered equivalent to the hundred thousand sesterces and upwards of the lex Papia) institutes a stranger as his heir (adoptive children being

regarded as strangers) the patron and his descendants to the fifth degree are entitled to a clear third of the inheritance. This third to which the patron is entitled against the external devisee of an opulent freedman, Justinian calls his Falcidia, and says that the Falcidia of the devisees, instead of being one fourth of the estate as in other cases, will in this case be only a fourth of two thirds, that is, a sixth of the estate, Cod. 6, 4. In fact, the praetorian edict giving the patron in the absence of sui heredes naturales of the freedman a right to a moiety of his estate, and the lex Papia giving him a right to a half or a third, even concurrently with sui heredes naturales, had really pro tanto promoted the patron from the order of agnates, assigned to him by the Twelve Tables, to that of sui heredes; at least, they gave him indefeasible rights similar to those of suus heres, both against intestate successions and against testamentum inofficiosum. Justinian cut down the rights of the patron and reduced him, except in this instance, to his old rank of agnate: still, by calling his portion his Falcidia, he recognizes that he has to this extent treated him as a suus heres.

A remarkable feature which pervades these new rules of succession to intestate freedmen is their disregard of agnation or civil relationship, wherein they are an anticipation of Novella, 118, which, A.D. 548, eliminated agnation from title by descent in the succession of ingenui. It had taken eight or nine hundred years to rid Roman jurisprudence of a barbarian caprice which had filled it with intricacy and, as irrational laws cannot be supposed to be generally comprehended, must have often caused cruel disappointments as to the devolution of property among blood relations.

SUCCESSIO PER BONORUM VENDITIONEM.

§ 77. Videamus autem et de ea successione quae nobis ex emptione bonorum competit.

§ 78. Bona autem veneunt aut vivorum aut mortuorum. vivorum, velut eorum qui fraudationis causa latitant, nec absentes defenduntur; item eorum qui ex lege Iulia bonis cedunt; item iudicatorum post tempus, quod eis partim lege XII tabularum, partim edicto Praetoris ad expediendam pecuniam tribuitur. mortuorum bona veneunt velut eorum, quibus certum est neque he-

§ 77. We next proceed to succession of a vendee to the estate of a bankrupt.

§ 78. The estate of a bankrupt may be sold either in his lifetime or after his death. It is sold in his lifetime when, for instance, he defrauds his creditors by absconding, or when he is absent and undefended, or when he avails himself of the lex Julia and surrenders his estate, or when, after judgment recovered against him, he has suffered the term to expire that is pre-

redes neque bonorum possessores neque ullum alium iustum successorem existere.

§ 79. Si quidem vivi bona veneant, iubet ea Praetor per dies continuos XXX possideri *et* proscribi; si vero mortui, p*er* dies XV. postea iubet convenire creditores, et ex eo numero magistrum creari, id est eum per quem bona veneant. itaque si vivi bona veneant, in diebus *X legem bonorum vendendorum fieri* iubet, si mortui, in *diebus V. a quibus tandem v*ivi bona *die* XX, mortui vero *die* X emptori addici iubet. quare autem tardius viventium bonorum venditio compleri iubet*ur*, illa ratio est, quia de vivis curandum erat, ne facile bonorum venditiones paterentur.

§ 80. Neque a*utem* bonorum possesso*rum*, *ne*que *bonorum emptorum res* pleno iure fiunt, sed in bonis efficiunt*ur*; *ex iure* Quiritium autem ita demum adquiruntur, si usuceperunt. interdum quidem bonorum empto*rum idem plane i*us quod est m*an*cipum *esse intelle*gitur, si per eos *scilicet* bonorum emptori*bus addicitur qui publice sub hasta vendunt* [*deest* 1 *lin*].

scribed, partly by the Twelve Tables, partly by the edict of the praetor, for the satisfaction of a judgment debt. A bankrupt's estate is sold after his death when it is certain that he has left neither an heir, nor a praetorian representative, nor any other lawful successor.

§ 79. If the bankrupt whose estate is to be sold is alive, an order issues from the praetor, and his estate is possessed and advertised for sale for thirty continuous days; if the bankrupt is dead, it is possessed and advertised for fifteen days. After this delay a second order issues from the praetor, directing the creditors to hold a meeting and elect out of their number a liquidator, by whom the estate may be sold. And after the expiration of the ten (?) days next following, if the bankrupt is alive, or of five (?) if he is dead, a third order issues from the praetor, and the conditions of sale are published. Finally, after the expiration of the twenty (?) days next following, if the bankrupt is alive, after the expiration of ten (?) if he is dead, a decree of the praetor transfers the universal estate of the bankrupt to the purchaser. The longer delay prescribed for the sale of the estate of a living bankrupt is founded on the greater consideration due to the living than to the dead, and is designed to protect a living debtor from unnecessary bankruptcy.

§ 80. Neither a [juxta-tabular, contra-tabular, or ab-intestato] praetorian successor, nor a purchaser in bankruptcy acquires plenary dominion, but only bonitarian ownership. Quiritarian ownership is only acquired by usucapion, though sometimes the purchaser of an universitas acquires at once quiritarian ownership, namely when he purchases sub hasta.

§ 81. Item quae de*bita sunt ei cuius fuerunt bona*, aut ipse debuit, neque bonorum possessore*s neque* bon*orum* emptore*s* ipso iure debe*nt aut ipsis debentur: sed* de omnibus rebus *utilibus actionibus et conveniuntur et experiuntur, quas inferius pro*ponemus.

§ 81. Debts owed to or by a heritage-leaver or a bankrupt are not at civil law owed to or by the praetorian successor or vendee in bankruptcy, but are recoverable by fictitious forms of action, which will be explained hereafter [4 § 34].

§ 77. Missio in possessionem and the subsequent bonorum venditio correspond in their essential character to the adjudication of bankruptcy and the concomitant transfer of the debtor's estate to the creditor's trustee of English jurisprudence.

Roman law never established any distinction between traders and non-traders, in other words, between bankruptcy and insolvency, a distinction once important in English law, and which even at the present day is not entirely effaced. Formerly, in consideration of the hazardous nature of trade, and the necessity of large credits to sustain an extensive commerce, the trader was treated with greater indulgence than the non-trader; and bankruptcy operated as a discharge of obligations, whereas insolvency only discharged the person of the debtor, and left his obligation to pay out of his after acquired estate in full force. This distinction is now abolished, and traders and non-traders are placed on the same footing. Roman law in respect of the continuing obligation of the bankrupt resembled the English law of insolvency.

In order to form a clear conception of this branch of the law, it is necessary to distinguish between an ordinary judgment execution in a personal action, that is to say, the enforcement by the power of the state of a judgment debt against a debtor who contumaciously omits to satisfy the judgment by voluntary payment, from an adjudication of bankruptcy, which is the process when a debtor is not only unwilling but also unable to fulfil his obligations. The English process in an ordinary execution is either a writ of fieri facias, commanding the sheriff to satisfy the debt by seizure and sale of the personal goods of the debtor; or a writ of levari facias, now disused, directing him to levy the debt out of the personal goods of the debtor, and the rents and profits of his land; or a writ of elegit, commanding him to deliver the debtor's goods to the creditor at an appraisement, and to put the creditor in possession of the debtor's land, to hold until out of the rents and profits thereof the debt is levied; or formerly, before imprisonment for debt was

abolished, a writ of capias ad satisfaciendum, commanding him to imprison the body of the debtor until satisfaction was made for the debt. After a man's body was taken in execution, no other process could be sued out against his lands or his goods, and after his lands were seized by elegit, his body could not be taken, but if part only of the debt was levied on a fieri facias, the creditor might have a capias ad satisfaciendum for the residue. So that body and goods might be taken in execution, or land and goods, but not both body and land. None of these remedies, we may observe, includes the sale of the debtor's land. In bankruptcy, on the contrary, the whole real as well as personal estate of the debtor is transferred to the creditors' trustee, to be sold or otherwise disposed of, at the discretion of the creditors.

We find a corresponding difference between execution and bankruptcy in Roman law, at all events in its later period. The proceeding in an ordinary execution, as opposed to proceedings in insolvency, was called pignoris capio, Dig. 4, 2, 1. A portion of the debtor's estate was seized, not by the plaintiff, as in the old legis actio called pignoris capio, but by public officers (the officiales, viatores, apparitores, executores of the magistrate), and, after being detained for two months to enforce payment by way of pledge, was sold in satisfaction of the debt. Movables were to be seized and sold in the first instance, but, if these were insufficient, lands might be seized and sold, Dig. 42, 1, 15. If a purchaser could not be found the property might be delivered to the creditor at an appraisement, ibid. In pignoris capio there was only a conveyance of a portion of the debtor's estate, there was no transfer of his juris universitas as in insolvency.

We have said that it was necessary to distinguish proceedings in bankruptcy from execution in a personal action. There is not the same danger of confusion between bankruptcy and execution in a real action. The judgment in a real action declares the plaintiff proprietor, if it passes in his favour, and possession of the thing in dispute is delivered to him by the sovereign power. The judgment in a personal action only declares the plaintiff creditor, and some payment or conveyance has still to be performed by the debtor.

As the levy of an execution by seizure and sale of a trader's goods for a debt of fifty pounds is an act of bankruptcy, it is evident that in English law execution will often involve bankruptcy; that is to say, when one creditor has obtained payment of

a debt by an ordinary execution, other creditors will proceed by petition for an adjudication of bankruptcy.

In order to understand the proceedings in bonorum emptio, or execution against the property of an insolvent debtor, the principal sanction of the Roman civil code in its later periods, we must study the earlier mode of execution by manus injectio, or process against the body of the debtor, which was one of the old legis actiones regulated by the Twelve Tables, and which was the model on which proceedings in missio in possessionem, or process against an insolvent's estate, were regulated by subsequent praetorian legislation [?] These proceedings are known to us by the statements of Aulus Gellius, who has given us the very terms of the Twelve Tables. Confessi igitur aeris ac debiti judicatis triginta dies sunt dati conquirendae pecuniae causâ quam dissolverent, eosque dies decemviri justos appellaverunt velut quoddam justitium, id est juris inter eos quasi interstitionem quandam et cessationem, quibus diebus nihil cum his agi jure posset. Post deinde nisi dissolverent, ad praetorem vocabantur, et ab eo quibus erant judicati addicebantur, nervo quoque aut compedibus vinciebantur. Sic enim sunt opinor verba legis: Aeris confessi rebusque jure judicatis triginta dies justi sunto. Post deinde manus injectio esto, in jus ducito. Ni judicatum facit, aut quis endo eom jure vindicit, secum ducito, vincito aut nervo aut compedibus. . . . Erat autem jus interea paciscendi, ac nisi pacti forent habebantur in vinculis dies sexaginta. Inter eos dies trinis nundinis continuis ad praetorem in comitium producebantur, quantaeque pecuniae judicati essent praedicabatur. Tertiis autem nundinis capite poenas dabant aut trans Tiberim peregre venum ibant. . . . Tertiis, inquit, nundinis partis secanto. Si plus minusve secuerunt, se fraude esto, Gellius, 20, 1. 'After an admission of debt or a judgment the debtor was allowed thirty days for payment. This delay is called a lawful interval by the decemvirs, and interposed a stay of legal proceedings. After its expiration, in default of payment, the debtor was summoned before the praetor and delivered to the custody of the creditor, to be confined in stocks or chains. The following are the expressions of the law: Admitted debts and debts proved by statute-process (?) must be satisfied within a lawful term of thirty days. When these are elapsed the debtor may be apprehended and taken before the magistrate. In default of satisfying the judgment, or of finding bail in the court who will bind himself to defend an action for the

debt, he shall be delivered into the hands of the creditor, to be forcibly removed and confined in stocks or fetters. . . . During a subsequent interval the debtor might effect a compromise, but in default of a compromise was detained in chains for sixty days. During this period, on three continuous ninth or market-days he was taken before the praetor in the comitium, where the amount of the judgment debt was proclaimed. On the third market-day he was put to death, or sold into slavery beyond the Tiber. . . . On the third market-day, say the Twelve Tables, the creditors may cut their portions of his body, and no creditor who cuts too little or too much shall be therefore called to account.'

In close imitation of this execution against the body, a process of execution against the property of an insolvent was introduced [?] by a praetor named Publius Rutilius, upwards of a century before the Christian era. It is from an assumption of the parallelism of these proceedings that we conjecture that in missio in possessionem an interval of two months was required to elapse between the first seizure and the ultimate sale (addictio) of the insolvent's estate. We may notice that the magisterial award (addictio) of the insolvent's body took place, according to Gellius, at the commencement of the sixty days of his detention; whereas the transfer (addictio) of the insolvent's estate to the vendee takes place at the end of sixty days from the original seizure. In confirmation of the opinion that the period of sixty days was observed in both forms of execution (corporeal and proprietary) against the insolvent, we may remember that in ordinary execution (pignoris capio), as above mentioned, a period of sixty days elapsed between the seizure and sale of the distress.

Some of the details of the proceedings in a missio in possessionem which are omitted by Gaius may be supplied from Theophilus. Before the final transfer of the debtor's estate (addictio) three decrees of the praetor were necessary:—

(1) A decree authorizing the seizure of the debtor's estate and its advertisement for sale (proscriptio). Theophilus gives the form of this advertisement: *ὁ δεῖνα, χρεωστὴς ἡμέτερος ὑπάρχων, εἰς αἰτίαν ἐνέπεσε διαπράσεως. ἡμεῖς, κρεδίτωρες ὄντες, τὴν τούτου διαπιπράσκομεν περιουσίαν. ὠνητὴς ὁ βουλόμενος προσίτω*, 3, 12. 'So-and-so, our debtor, is bankrupt; we, his creditors, are about to sell his estate; whoever wishes to purchase is invited to attend.' This advertisement was affixed to the Columna Maenia, which was in the forum on the Puteal near the Carcer. Pliny, N. H. 7, 60. In the old

system of manus injectio, the judgment debtor (judicatus), after the expiration of the thirty dies justi, was no longer allowed to defend an action in person, but might, as we see by the above-quoted fragment of the Twelve Tables, be defended by a vindex. In the formulary system, the equivalent of the vindex was satisdatio judicatum solvi, security with two sureties for the payment of the judgment to be recovered, and the judgment recoverable in an actio judicati was for twice the amount of the disputed judgment debt, Gaius, 4 § 9, 4 § 102. Supposing, however, the missio in possessionem was not founded on a previous judgment, but on the debtor's absconding or keeping house, then the period at which he was disabled from defending an action, unless he gave security (judicatum solvi), was the expiration of thirty days after his estate had been seized and advertised for sale, Cicero, Pro Flacco.

(2) After the possession and proscription of the estate for thirty days, a second decree of the praetor empowered the creditors to hold a meeting and elect a magister to manage the sale, corresponding to the creditor's assignee or, at the present day, the creditor's trustee of English law.

(3) After a certain period, a third decree authorized the publication of the conditions of sale, which were appended to the original advertisement.

After another period, completing, in all probability, sixty days from the first missio in possessionem, the sale took place by public auction, the universitas juris of the debtor being transferred to the bidder who offered the creditors the highest dividend, that is, the greatest amount in the pound on their respective claims.

The periods prescribed for these successive stages of the proceedings are not decipherable in the manuscript of Gaius. In the translation they are assumed, in the case of a deceased bankrupt, to have been half the periods prescribed in the case of a living debtor.

The principal acts or defaults which entitled a Roman creditor to bonorum venditio, may be compared with those which entitle an English creditor to petition for an adjudication in bankruptcy, i. e. to the so-called acts of bankruptcy of English jurisprudence.

(1) As manus injectio might be founded on a previous judgment or an admission of debt (res judicata or aes confessum), and missio in possessionem might be granted instead of pignoris capio against judicatus who makes default, so in English law non-payment of an admitted or a judgment debt after service of a debtor's summons is

an act of bankruptcy, and instead of suing out a writ of execution the creditor may petition for adjudication of bankruptcy.

(2) When there is no previous judgment or admission of debt, a debtor who absconds or secretes himself, with intent to defraud his creditors, commits an act of bankruptcy in both systems of law. In English law, for instance, if a debtor makes an appointment with a creditor to meet at the debtor's place of business, and avoids the meeting with the intention of delaying the creditor; or if he withdraws from his usual counting-house to a room upstairs, to avoid the rightful and personal solicitation of his creditors for payment, he commits an act of bankruptcy. So in Roman law: Praetor ait: In bona ejus qui judicio sistendi causâ fidejussorem dedit, si neque potestatem sui faciet neque defendetur, iri jubebo, Dig. 42, 4, 2. 'The praetor says in the edict: If a man enter into a bond with suretyship to appear at a trial, and neither appears in person nor by procurator, I will permit the plaintiff to seize his goods.' Again: Praetor ait: Qui fraudationis causâ latitabit, si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo, Dig. 42, 7, 1. 'The praetor says in the edict: If a man secrete himself with intent to defraud his creditors, and is not defended by a procurator who gives security approved by an arbitrator, I will order his property to be seized and sold.'

There is no adjudication of bankruptcy against a deceased debtor in English law, but there may be a transfer of his universitas juris as in Roman law; for creditors, in default of other administrators, may take out letters of administration against the estate of a deceased debtor.

Cessio bonorum was introduced by a lex Julia, enacted either by Julius or Augustus Caesar, and if by the latter, in imitation of a measure of the former which he himself has recorded. In the year 48 B.C. when Caesar was consul, credit having collapsed in consequence of the civil war, debtors being generally insolvent, and money having disappeared, Caesar allowed them to discharge their obligations by the transfer of their estates, movable and immovable, to their creditors, at the value, appraised by arbitrators, which they would have borne before the commencement of the war, De Bello Civili, 3, 1. Cessio bonorum conferred three benefits on the debtor: exemption from arrest and imprisonment, exemption from infamy exemption of his after-acquired property from liability beyond a certain amount. Of these in order.

(*a*) After the abolition of the legis actiones, and the introduction of execution against the estate, execution against the body of the debtor still remained as one of the remedies of the civil code. The insolvent debtor was incarcerated and compelled to labour for the benefit of the creditor, although he could no longer be sold as a slave. Of this there are many proofs. Praetor eos duci, bona eorum possideri, proscribique venireque jubeto. Lex Galliae Cisalpinae. 'The praetor shall order the body of the insolvent to be delivered to the creditor and imprisoned, and his estate to be possessed, proscribed, and sold.' Quum judicatum non faceret, addictus Hermippo et ab hoc ductus est, Cicero, Pro Flacco, 20. 'On failing to pay the judgment debt, his body was delivered to the creditor, and removed to prison.' [Another perusal of Savigny's essay on this subject, Vermischte Schriften, 19, compels me to accept his conclusion that Personal execution—incarceration, manus injectio—was always confined to a judgment on a money loan—mutuum, numerata pecunia: or on Nexum—a fictitious money loan, a contract transformed or novated by a fiction of a money loan, particularly a contract for payment of interest, which in itself was not a contract of mutuum but of stipulatio: or on certain other obligations assimilated by statute to mutuum, e.g. actio depensi, 4 § 22. Execution against the estate was not, then, a modern invention but coeval with execution against the body; and was employed against all judgment debtors except those condemned for a money loan, real or fictitious, or for depensum or certain other grounds defined by statute. The lex Poetelia left untouched Personal execution for genuine money loans; and this execution was still practised in the time of Justinian, though rendered uncommon by the frequency of Cessio bonorum. The lex Poetelia only abolished Personal execution for Nexum (a fictitious money loan) though it also mitigated the treatment of the debtor condemned (judicatus, addictus) for a genuine loan]. From this personal execution a debtor was exempted by cessio bonorum. In eo tantummodo hoc beneficium eis prodest ne judicati detrahantur in carcerem, Cod. 7, 71, 1. 'The principal benefit of bonorum cessio is, that it exempts the insolvent from incarceration.'

(*b*) The assignment (addictio) of the insolvent borrower reduced him to a state of partial servitude. But the Roman lawyers distinguished between partial slavery (servire) and complete slavery (servum esse), Quintilian, 7, 3. For instance, the addictus retained

his praenomen, nomen, cognomen, tribe, could by payment of his debt recover his liberty at any time without the consent of the creditor, and on recovery of his liberty was not libertinus but ingenuus. As, then, addictio did not reduce a freeman to slavery, it did not operate a degradation of status (capitis minutio).

Insolvency, however, deeply affected another branch of status, namely, civitas, although even here, as it only partially destroyed the privileges of civitas, it was not considered to operate a capitis minutio. Civitas, as we have seen, consisted of two portions, certain political or public rights, jus suffragii and jus honorum, and certain civil or private rights, collectively denominated commercium and connubium. The political half of civitas was destroyed by insolvency, which deprived a man of his electoral powers and his capacity for office, and reduced him to the condition of aerarius; and even the civil half was seriously impaired, and principally in respect of commercium. Of the aggregate of capacities called commercium the privilege forfeited by insolvency was the capacity of appointing or being appointed procurator, Inst. 4, 43, 11. By being disabled from appointing a procurator a man might be seriously hampered in his commercial proceedings, as he would be unable to cede a right of action; by being disqualified for acting as procurator he would be unable to acquire by cession a right of action, and would be unable to sue for a penalty as an informer in a popularis actio, 4 § 82, for the prosecutor in such an action was considered to be the procurator of the people. The various privileges enjoyed by a citizen of untarnished credit, and liable to be forfeited by insolvency, were called his existimatio, and the disabilities of insolvency were summed up in the word 'infamia' or 'ignominia.' From this loss of existimatio the insolvent was exempted by bonorum cessio. Debitores qui bonis cesserint licet ex eâ causâ bona eorum venierint, infames non fiunt, Cod. 2, 12, 11. 'The surrender of a debtor's estate, though followed by a sale, does not involve infamy.'

(*c*) Proceedings in bankruptcy or insolvency, particularly in modern days, may be looked upon in two lights: either as a mode of execution, that is, as assisting the creditor to recover as much as may be of his rightful claims, or as a mode of liberation, that is, as a relief of an unfortunate debtor, releasing him of his debts without payment, and enabling him to 'begin the world again' without the overwhelming pressure of his past obligations. By the present English law, a bankrupt is discharged of his obliga-

tions by payment of a dividend of ten shillings in the pound, or, failing this, by a resolution of his creditors that his bankruptcy has arisen from circumstances for which he cannot justly be held responsible, and an expression of their desire that he should receive an order of discharge. Roman law only admitted this in one case, the case of a slave instituted heres necessarius, 2 § 155, in order to save the credit of an insolvent testator. After once undergoing bankruptcy, such a person was not liable to further molestation. But the after-acquired property of other insolvents remained liable to successive sales until plenary satisfaction of their debts. Accordingly, bankruptcy is not enumerated, 3 § 168, as one of the modes of extinguishing obligation.

To encourage the bankrupt, however, to make a bonorum cessio, in order that as much as possible might be saved from the wreck of his fortunes for the benefit of his creditors, bonorum cessio not only discharged him, as we have seen, from personal execution, but discharged from liability such portion of his after-acquired property as was necessary for his subsistence. Qui bonis cesserint nisi solidum creditor receperit non sunt liberati, Cod. 7, 71, 1. Is qui bonis cesserit, si quid postea acquisierit, in quantum facere potest convenitur, Dig. 42, 3, 4. 'Bonorum cessio does not discharge the insolvent's estate until he makes full satisfaction, but exempts him from subsequent pursuit for more than he can afford to pay.'

Both in Roman and in English law there is a transfer of the insolvent's juris universitas, but with this difference—in English law the bankrupt's estate is vested in the creditor's trustee, in Roman law it vested not in the magister but in the vendee, the emptor bonorum.

In the last period of Roman law, such as we find in the time of Justinian, venditio bonorum was superseded by distractio bonorum, which involved no transfer of the juris universitas. A curator was appointed by the praetor, and instead of selling the active and passive universality of the insolvent's estate to a purchaser who became liable to the insolvent's creditors, merely sold the active residue of his estate in detail. Justinian attributes this change to the abolition of the formulary procedure and generalization of cognitio extraordinaria; Theophilus, to the abolition of the conventus, assizes, sessions, or brief law terms of the provinces, and the erection of permanent provincial tribunals. But it is not easy to see in what respect the changes were correlated.

In § 80 Gaius apparently mentioned that one case of bonorum

emptio vested quiritary property in the vendee, and some expositors have conjectured that he alluded to bonorum sectio. Some criminal condemnations involved confiscation, and the sale of the criminal's estate was conducted not by a magister but by a quaestor of the treasury, who sold under the spear, the symbol of quiritary dominion. Sectio bonorum passed quiritary property and transferred the juris universitas of the criminal. It is alluded to, 3 § 154, 4 § 146. Bonorum cessio, as we are expressly informed, Cod. 7, 71, 4, only gave the creditors a power of sale and did not invest them with quiritary dominion.

The following observations may serve to supplement the brief remarks of Gaius on the subject of Insolvency:

Bankruptcy proceedings are a partial execution, and therefore belong, not to the law of Dominion, but to the law of Obligation or the law of Procedure. The latter, as we have already noticed, has some elements which are not purely formal, but material, and as such are rightly admitted to a treatise on substantive law. Insolvency is placed by Gaius in the sphere of Dominion or Real rights, because in his day insolvency occasioned a transfer of a universitas, which was deemed to be a jus in rem. In later Roman law no such transfer occurred.

Proceedings in Insolvency may be divided into two portions, of which one is (A) preparatory, and the other (B) final.

(A) The preparatory portion includes the Proof of their debts by the several creditors; the collection of the assets or formation of the Massa; and its sale. The collection of the assets includes, on the one hand, the recovery back of property that has been aliened in fraudem creditorum; and, on the other, the elimination or separation from the mass of such things found in the possession of the insolvent as were not really his property but the property of other persons called Separatists.

Separatist claimants are those claimants

(1) Who can sue for a thing by any form of Real action, whether a rei vindicatio, or actio Publiciana, or hereditatis petitio, or actio confessoria brought to recover some Personal servitude like ususfructus. An actio confessoria to enforce a Real servitude is obviously not an interest of a nature to give a right of Separation. Those who had a pignus or hypotheca were also ranked by the Romans among the Separatists: in German civil law they take their place among the creditors proper or concurrent.

(2) Or Separatists are claimants who have a Personal action

whereby they can recover some Specific thing from the possession of the insolvent; such as actio commodati, depositi, locati, mandati; condictio furtiva, interdictum unde vi; actio de pauperie, or actio quod metus causa.

(B) The final stage is the distribution of the realized proceeds of the present assets among the concurrent creditors according to their classification. The partial execution is not a discharge of the insolvent, and therefore subsequent assets will be subject to a subsequent distribution.

In modern Roman law concurrent creditors are marshalled in five classes.

1. Creditors with an Absolute privilege, viz. creditors for the funeral expenses of the insolvent. Modern law adds Servants who are creditors for their wages, and the Fiscus which has a claim for arrears.

2. Privileged Hypothecary creditors, i.e. the Fiscus, the wife for her dower, and any creditor who lent money for the purchase or conservation of the subject of hypothecation, e.g. to buy the land or build the house, or build, or buy, or equip the ship, that is hypothecated.

3. Simple hypothecary creditors, who have priority according to the date of their mortgage.

4. Privileged chirographary (merely personal) creditors, or creditors unprotected by mortgage. Privileged are creditors who lent money for the repair of a house; for the purchase, construction, or equipment of a ship; or depositors of money, without interest, in the hands of the insolvent as banker (argentarius, mensularius).

5. Unprivileged personal creditors, Savigny, § 374; Vangerow, § 593.

DE ACQUISITIONE PER ARROGATIONEM ET PER IN MANUM CONVENTIONEM.

§ 82. Sunt autem etiam alterius generis successiones, *quae* neque lege XII tabularum neque Praetoris edicto, sed eo iure *quod* consensu receptum est introductae sunt.

§ 83. *Ecce enim* cum paterfamilias se in adoptionem de*dit*, mulier*ve* in manum convenit, *omnes eius* res incorporales et corporales quaeque ei debitae sunt, patri ado*ptivo* coemptionatorive adquiruntur, exceptis iis quae per capitis deminu-

§ 82. There are other kinds of universal succession not governed by the law of the Twelve Tables nor by the praetor's edict, but by rules of consuetudinary law.

§ 83. When a paterfamilias gives himself in adoption, or a woman subjects herself to a fictitious purchaser, all their property, incorporeal and corporeal, and all debts due to them, are acquired by the adoptive father and the fictitious

tionem pereunt, quales sunt ususfructus, operarum obligatio *libertorum* quae per iusiurandum contracta est, et *quae continentur* legitimo iudicio.

purchaser, excepting such rights as are extinguished by loss of status—usufruct, for instance, bounden services of freedmen secured by oath, and claims disputed in a pending statutory trial.

§ 84. *Sed ex diverso quod debet is qui se in* adoptionem dedit, *vel quae in manum convenit, ad* ipsum *quidem* coemptionatorem aut ad patrem adoptivum *pertinet* hereditarium aes alienum; *proque eo, quia suo* n*omine* ipse pater adoptivus *aut coemptionator* heres fit, directo tenetur iure, *non vero is qui* se adoptandum dedit, qu*ae*ve i*n manum convenit, quia* desin*it iure civili* here*s esse.* de eo vero quod pri*us suo nom*in*e eae* personae debuerint, licet neque pater ado*ptivus* teneatur neque coemptionator, *neque* ipse quidem qui se in adoptionem ded*it vel* quae in manum convenit maneat obligatus obligata*ve*, quia *scilicet* per capitis diminutionem *libere*tur, tamen in eum eamve *ut*ilis actio datur *rescissa* capitis deminutione: et si adversus hanc actionem non defendantur, quae bona eorum futura fuissent, si se alieno iuri non subiecissent, universa vendere creditoribus Praetor permittit.

§ 84. Conversely, as to what is owed by the person adopted or the woman subjected to hand, if it is a debt of an ancestor or testator, the fictitious purchaser or adoptive father, by acquiring the succession, becomes directly liable, while the person adopted and woman sold into subjection are released from liability by ceasing to be successors at civil law; but if the debt was owed in their own name, their adoptive father or fictitious purchaser incurs no liability, while the person adopted and woman sold into subjection cease to be liable at civil law, their liability being extinguished by their loss of status: they are liable, however, in a praetorian action based on a feigned restoration of their status (4 § 38), and if the action is not defended the goods which would have belonged to them but for their degradation may be all sold by their creditors on obtaining the requisite permission of the praetor.

§ 84. By arrogation a man descended from the superior status of paterfamilias to the inferior status of filiusfamilias, from domestic independence to domestic dependence. It operated, that is to say, a degradation (capitis minutio minima). Capitis minutio minima had various effects on a man's rights and obligations:—

(*a*) As it implied a change of family, it entailed a loss of rights founded on agnation, including the sworn services of a freedman.

(*b*) It involved some forfeiture of rights contested in a legitimum judicium (3 § 181), but on this point the state of the MS. of Gaius leaves us in the dark.

(*c*) It had further effects which perhaps we must be contented at the present day to regard as merely positive and inexplicable.

Thus it extinguished any ususfructus or usus vested in the arrogatus. This effect was abrogated by Justinian.

(*d*) It extinguished debts owed by the arrogatus. As a filiusfamilias was just as capable at civil law of incurring debts as a paterfamilias, it is hard to say why the passage from one condition to the other should operate an extinction of debt. This effect, as we see, was counteracted by the quasi legislative action of the praetor.

Arrogatio in the legislation of Justinian ceased to operate a transfer of the universitas juris. It only conveyed to the arrogator a life estate (ususfructus) in the property of the arrogatus. The reversion or fee (dominium) remained in the arrogatus, Inst. 3, 10, 2.

Coemptio is not noticed by Justinian, as the in manum conventio of the wife was obsolete long before his time.

DE HEREDITATIS IN JURE CESSIONE.

§ 85. *Item si is ad quem ab intestato legitimo iure pertinet hereditas eam hereditatem, antequam cer*nat aut pro herede gerat, alii in iure cedat, plen*o* iur*e heres fit is cui eam cesserit, perinde ac si ipse per* legem ad hereditatem vocaretur. quodsi posteaquam heres extiterit, cesserit, adhuc heres manet et ob id creditoribus ipse tenebitur: sed res corporales transferet proinde ac si singulas in iure cessisset; debita vero pere*unt*, eoque modo debitores hereditarii lucrum faciunt.

§ 85. If a person entitled to succeed as agnate to an intestate, before declaring his acceptance or acting as heir, surrender the inheritance in a fictitious vindication, the plenary right of succession passes to the surrenderee exactly as if he were entitled by agnation. If the agnate first accepts and then surrenders, he continues heir, and is liable to the creditors for the debts of the deceased: the corporeal subjects of the inheritance pass just as if they were separately surrendered, but the debts to the inheritance are extinguished and the debtors are discharged of liability.

§ 86. Idem iuris est, si testamento scriptus heres, posteaquam heres extiterit, in iure cesserit hereditatem. ante aditam vero hereditatem cedendo nihil agit.

§ 86. The same happens when a devisee accepts and then surrenders, but before acceptance his surrender is inoperative.

§ 87. Suus autem et necessarius heres an aliqui*d* ag*a*nt in iure cedendo, quaeritur. nostri praeceptores nihil eos agere existimant: diversae sc*h*olae auctores idem eos agere putant, quod ceteri post aditam hereditatem; nihil enim in-

§ 87. Whether a self-successor or a necessary successor passes the succession by surrender to a fictitious vindicator, is a question. According to my school they have not the power: the other school think that the effect is the same as when the

terest, utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur. [*lin. vacua.*]

other heirs surrender after acceptance, and that it makes no difference whether a man is heir by legal compulsion or by voluntary acceptance or by acts of heirship.

§ 85. Gaius now proceeds to another mode of conveying a juris universitas, the conveyance by an agnate of a delated but not accepted inheritance. We must bear in mind the distinction between heres and vocatus ad hereditatem, the offer (delatio) of an inheritance by the law or by a testator, and its final acquisition (aditio, acquisitio) by the delatee (2 § 152). In the case of the heres necessarius, the self-successor and the testator's manumitted slave, delatio and acquisitio coincide; but in the case of the voluntarius heres, the agnate or the extraneus scriptus, they are two distinct events. An explanation of the causes of the different effects of an in jure cessio by these different classes might have thrown some light on this branch of early Roman law, but the reasons are not given by Gaius, and perhaps we must now be content to regard these distinctions as merely positive and inexplicable rules. Perhaps, as Ihering suggests, it was held, that to permit a devisee to part with the inheritance—in other words, to convert it into money—would have been in direct opposition to the testator's intention; who, if he approved of such a step, might have adopted the mode of testation explained on 2 § 185, i. e. might have instituted not the devisee but his slave.

Successio per universitatem, as already mentioned, was an institution only recognized by the legislator in a limited number of cases: one individual could not make another, in pursuance of private convention, his universal successor. In respect of the voluntary transfer, inter vivos, of an inheritance, universal succession was only admitted in two cases: transfer by an agnate of delata hereditas (of his right to acquire an intestate succession) in the interval between delatio and aditio, and transfer (restitutio) by a devisee of a fideicommissaria hereditas in pursuance of a testamentary trust.

The usual conveyance of an inheritance was not by in jure cessio, but by emptio venditio accompanied with tradition and stipulations respecting the debts to or from the inheritance, 2 § 252.

DE OBLIGATIONIBUS.

§ 88. *Nunc transeamus* ad obligationes. quarum summa divisio in duas species deducitur: omnis enim obligatio vel ex contractu nascitur vel ex delicto.

§ 89. Et prius videamus de his quae ex contractu nascuntur. harum quattuor genera sunt: aut enim re *con*trahitur obligatio, aut verbis, aut litteris, aut consensu.

§ 88. We proceed to treat of obligations, which fall into two principal classes, obligations created by contract and obligations created by delict.

§ 89. We first treat of those which are founded on contract, which are of four orders, for contract is concluded by performance, by words, by writing, or by consent.

Having examined Unequal primary real rights (status) and a portion of Equal primary real rights, namely, property and servitudes, and omitting the detailed examination of another portion of Equal primary real rights, namely, Primordial rights, we quit the subject of real rights, jura in rem, negative rights, or rights to forbearances binding indifferently all the world, and proceed to Obligations, jura in personam, positive rights; that is to say, rights to certain acts or performances binding exclusively certain individuals.

The law of Obligation, at least of obligation founded on contract, differs from other branches of law in that its function is rather auxiliary to human freedom than restrictive or coercive. While the law of Status and the law of Property are imperious and peremptory and felt by the fetters they impose on human volition, the law of Contract is ministerial to manifestations of will, and fosters and protects the most diversified activity and enterprize. The law of Contract is the most plastic part of the code and the part most susceptible of development: it is the portion of Roman jurisprudence which has survived with least alteration in modern Europe; and of all modern codes it is the portion whose relative importance is already the greatest and is continually increasing.

The Obligation which is a subject of jurisprudence implies compulsion: Debitor intelligitur is a quo invito pecunia exigi potest, Dig. 50, 16, 108. 'Debtor (obliged) denotes a person from whom money may be extorted against his will:' i. e. it excludes merely moral duties (officia) because the sovereign applies no coercion to enforce their performance.

Obligation, in the narrower sense in which we proceed to use the term, also excludes those duties which the legislator imposes on all the world alike towards a person invested with a Real right,

whether a Primordial right, a right of Status, or a right of Dominion. These duties are mainly negative, duties of forbearance or abstention; whereas Obligations in the narrower sense, the sense in which the word is used by the classical jurists, are mainly positive, duties of action or performance. The former, that is, negative obligations, obligations correlative to jus in rem, have scarcely received a distinctive appellation in the Latin language: for the sake of distinction from moral duties they may be called Necessitas, and for the sake of distinction from Positive duties, Necessitas abstinendi.

Justinian defines Obligation as follows: Obligatio est juris vinculum quo necessitate astringimur alicujus solvendae rei secundum nostrae civitatis jura, Inst. 3, 13. 'Obligation is a legal bond, that is, the being compelled to some performance by the law of the state (power of the sovereign).'

Having formerly divided Obligations into Primary and Secondary, we may inquire which of these classes is more directly contemplated in this definition. Apparently the class of Secondary obligations: at least the definition is not applicable to all cases of Primary obligation. In Obligations ex contractu the necessitas both of the Primary and the Secondary obligation is a necessitas solvendi: in Obligation ex delicto while the necessitas of the Secondary obligation is necessitas solvendi; the necessitas of the Primary obligation (there is no Obligation in the classical sense of the term) is not necessitas solvendi but necessitas abstinendi.

The performance (solutio) of which the law imposes a necessity when it imposes an obligation is sometimes decomposed into three elements, expressed by three terms, datio, factio, praestatio. In personam actio est quotiens cum aliquo agimus qui nobis ex contractu vel ex delicto obligatus est, id est, cum intendimus dare, facere, praestare oportere, 4 § 2. 'A personal action pursues an obligation arising from contract or delict, and declares that the defendant is bound to convey, perform, or indemnify.' Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum, Dig. 44, 7, 3. 'An obligation does not subject a thing corporeal or incorporeal to our dominion, but compels a person to convey some dominion, or render some service, or repair some loss.' Datio denotes the transfer of quiritarian dominion in a certain thing or sum of

money: Factio any service (traditio, restitutio, exhibitio, &c.) other than the transfer of quiritary dominion in a certain thing: and Praestatio, apparently, the discharge of any obligation engendered by maleficium.

However diversified may be the Object of an obligation, it is always transformable, in the eye of the law, into the payment of a certain sum of money. Ea enim in obligatione consistere quae pecunia lui praestarique possunt, Dig. 40, 7, 9, 2. 'Obligation can only have for its Object something redeemable and replaceable by money.' Hence if it is desired to bind to the performance of some act not in its nature susceptible of pecuniary appreciation, it is necessary to make the direct Object of stipulation the payment of a certain penal sum, and the non-performance of the act desired the title or condition whereupon the penal sum shall be forfeited; for then the obligation, having a pecuniary value, is a civil obligation enforceable by the tribunals. The performance of the act desired is thus practically enforced, although nominally it is removed from the position of Object of the stipulation to that of Condition.

In speaking of the right of Dominion, we have already noticed (2 § 1, commentary) that besides the primary OBJECT of the right (abstention from molestation), there is always a secondary object or SUBJECT, land, house, slave, or the like, to which such molestation relates. So, in view of this transformability of all Objects of obligation into money payments, we may say that the OBJECT of every obligation is an Alienation, or transfer of property; and the SUBJECT is always a certain amount of Pecuniary value.

The primary and most comprehensive division of Obligatio is one that has already been noticed, 1 § 1, into (A) CIVILIS obligatio, and (B) NATURALIS obligatio.

(A) CIVILIS obligatio is obligation enforceable by action, whether it derives its origin from Jus civile, as the obligation engendered by formal contracts or the obligation enforceable by bilaterally penal suits, or from such portion of Jus gentium as had been completely naturalized in the civil law and protected by all its remedies; such as the obligation engendered by Formless contracts, and obligation to indemnify engendered by delict.

(B) Obligatio NATURALIS is obligation not immediately enforceable by action, or obligation imposed by that portion of Jus gentium which is only imperfectly recognised by Civil law; obliga-

tion, however, which is recognized by Positive law in various operations, e.g. as founding a defence called Exceptio, i. e. a contention that the right of the plaintiff, though not nullified, is counteracted by an opposing right of the defendant; as giving a right of Retention (barring condictio indebiti soluti) and Compensation; and as forming a basis of various Accessory institutes of Civil law, such as Novatio, Pignus, Fidejussio, Constitutum.

Naturalis obligatio, with its partial and occasional protection, may seem a singular and anomalous institute of Roman law, but it is paralleled by the recognition, though to a very minor extent, of Imperfect obligations in English jurisprudence. Imperfect obligations are so called, not because they are less binding in the forum of conscience than those which are perfect, but because they are not directly enforced by political sanctions, because various motives induce the political legislator to exempt the debtor from positive coercion. Instances of imperfect obligation are, debts contracted in infancy, debts barred by a statute of limitations, debts discharged by adjudication of bankruptcy. A ratification in writing after the attainment of majority, or a written promise to pay by the bankrupt or debtor discharged by limitation, perfects and revives the imperfect obligation, and makes it ground to support an action. As in English law a merely moral duty is an inadequate consideration to support and validate a promise to pay, the validity of such ratificatory promises shows conclusively that the obligation of the infant, the insolvent, the debtor discharged by limitation, is regarded in English jurisprudence as something more than a moral obligation, as, to a certain extent, a legal obligation; that is, is viewed by English tribunals in the light in which naturalis obligatio was viewed by Roman tribunals.

Civil obligations fall under two principal classes: (1) those to which the title or investitive fact is a CONTRACT; and (2) those to which the title or investitive fact is a DELICT. In obligation created by CONTRACT there are two stages: there is first a primary or sanctioned Personal right antecedent to wrong, and afterwards a secondary or sanctioning Personal right consequent on a wrong. In obligation founded on DELICT there is the second stage, a secondary or sanctioning Personal right consequent on a wrong, but the first stage is not a Personal right (jus in personam), but a Real right (jus in rem), whether a Primordial right, right of Status, or of Property.

These two typical classes, however, fail to comprehend all the obligations enforceable by action, and two supplementary classes have to be added: (3) obligations similar to those founded on contract; and (4) obligations similar to those founded on delict.

A Contract is a convention or agreement (conventio, pactio, pactum) enforceable by appeal to a court of judicature. Et est pactio duorum pluriumve in idem placitum consensus, Dig. 2, 14, 1, 2. 'A convention is the consent of two or more parties that a party shall do or not do some particular thing.'

Consensus, the essence of convention, will be found on close examination to consist not, as might at first sight appear, of two precisely similar elements contributed by the two consenting parties, but of two dissimilar elements, an intention signified by a promisor, and a corresponding expectation signified by a promisee. The promisor promises that he will do or perform some given act or acts, or that he will forbear or abstain from some given act or acts; that is, he signifies to the promisee that he intends to do the acts or to observe the forbearances which form the object of his promise: and the promisee accepts the promise; that is, signifies to the promisor his belief or expectation that the latter will do or forbear agreeably to the intention which he has expressed. Every convention, then, consists of a promise proffered and accepted; that is, (1) of a signification by the promising party of his intention to do the acts or to observe the forbearances which he promises to do or observe, and (2) a signification by the promisee that he expects that the promising party will fulfil the proffered promise. Without signification of the intention there is no promise; without signification of the expectation there is no reason for enforcing the promise. The consensus of the parties is the chiming or going together of this intention with this expectation; their direction to a common object, the acts or forbearances contemplated by the convention. Pollicitation is the offer of the one party before it is accepted by the other. Pactum est duorum consensus atque conventio; pollicitatio vero offerentis solius promissum, Dig. 50, 12, 3.

A leading division of contracts or conventions enforceable by action is into FORMAL contracts, or contracts of civil law (legitimi, Dig. 2, 14, 5), and FORMLESS contracts, or contracts of Jus gentium. Formal contracts are Nexum, Verbal contract or Stipulatio, and Literal contract or Expensilatio. Formless contracts are Real (Mutuum, Commodatum, Depositum, Pignus, Innominate

contract), or Consensual (Emptio, Locatio, Societas, Mandatum). Formal contracts derive their validity from the observance of a symbolic form prescribed by positive law, and calculated to inspire by its solemnity serious reflection in the negotiators, and to distinguish definitive resolution from preparatory negotiation and debate. In Real contract the earnestness and definitiveness of the resolution is proved by one contractor parting with property or possession. The obligation, too, contracted by the other party is perfectly plain, being in most cases simply restitution. In Exchange (permutatio), an Innominate contract, the duty of the promisor is not quite so simple; it is not restitution, but the transfer of an equivalent; and, accordingly, the validity of the contract of Exchange was not established till a comparatively late period of Roman jurisprudence. The daily and hourly employment of the Consensual contracts of Purchase and Hiring, while it would make the requirement of any formality intolerably inconvenient, also renders the nature of these contracts perfectly familiar to all the world, so that the mere mention of their Names awakens as vivid a picture of their consequences as could the observance of the most ceremonious Form. In the remaining Consensual contracts, Agency and Partnership, the position of the Agent or Partner who is called to account for property that has passed into his hands or that has been lost by his negligence is so similar to that of a party to a Real contract that there could be no hesitation in extending to these contracts the protection of the public tribunals.

A convention that was neither valid by its Form, nor was one of the four Consensual contracts with their familiar Names, nor was a Real contract, that is, a convention where on one side the consideration (causa praeter conventionem, Dig. 2, 14, 7, 4) was executed, nor was made valid by the edict or any special statute, was not directly enforceable at law, and was called a Nudum pactum. A Nude pact, though ineffectual to produce civilis obligatio, produces naturalis obligatio. Igitur nuda pactio obligationem non parit, sed parit exceptionem, Dig. 2, 14, 7, 4. 'A nude pact creates no (civil) obligation, but creates a defence.' Interest on a loan could only be secured by the Formal contract of Stipulatio: but a nude pact to pay interest could be confirmed by pignus, Dig. 13, 7, 11, 3, and could be pleaded in bar to a suit for recovering back the interest when actually paid (condictio indebiti soluti): and we have seen that exceptio, pignus, solutum non repeti, are some of

the criteria which indicate the existence of naturalis obligatio, Dig. 46, 3, 5, 2.

Another important division of contracts is into UNILATERAL and BILATERAL. Wherever mutual promises are proffered and accepted there are in strictness two or more conventions; but where the performance of either of the promises is made to depend on the performance of the other, the several conventions are cross or implicated conventions, and therefore are commonly deemed one convention. Where one only of the agreeing parties gives a promise, the proffered and accepted promise is called a Unilateral convention; where each gives a promise, and the performance of either is made to depend on the performance of the other, the several proffered and accepted promises are called a Bilateral or Synallagmatic convention. But strictly speaking, as before stated, every convention is Unilateral, and every Bilateral convention is formed by the implication of several Unilateral conventions. The sole Unilateral conventions are Expensilatio, Stipulatio, Mutuum. Venditio, Locatio, Societas, are examples of Bilateral conventions. Depositum, Commodatum, Pignus, Mandatum, are called imperfectly Bilateral conventions, because they do not necessarily and originally produce any reciprocal obligation, but only ex postfacto, i. e. in consequence of some occurrence subsequent to the convention. The action founded on the original obligation of a semi-bilateral convention, i. e. the action of the depositor, lender for use, pawnor, principal, is called judicium directum: the action founded on the accidental or ex postfacto obligation, i. e. the action of the depositary, borrower for use, pawnee, agent, is called judicium contrarium. Unilateral conventions, even though, like Mutuum, institutions of Jus gentium, give rise to condictiones or actions of strict civil law (stricti juris actiones); bilateral and semi-bilateral conventions give rise to equitable actions (bonae fidei actiones).

The terms Unilateral and Bilateral have already been used to differentiate the genus of Contract, Disposition: and it may be useful to notice the difference of meaning which these terms bear in the two connections. A Unilateral Disposition is one made by a solitary principal disposer: e. g. in testamentary disposition all other persons who intervene are accessory and subordinate to the testator. A Bilateral Disposition, or Contract, or Convention, is one where there are two coordinate principal disposers. A Unilateral convention is one where there is a single promissor and

a single acceptor: a Bilateral convention is one where there are two promissors and two acceptors, that is, where both parties are equally promissors and acceptors.

The classification of contracts by Gaius does not include the Nexum. Nexum apparently had three functions: it was a solemn form of alienation (including testamentary disposition), a solemn form of obligation, and a solemn form of extinction of obligation. Si quid eo nomine debeatur quod per aes et libram gestum est, 3 § 173. Nexum, Mucius Scaevola scribit, quae per aes et libram fiant ut obligentur praeterquam quae mancipio dentur, Varro, 6, 5. 'Nexum, according to Scaevola, is any disposition which employs the bronze ingot and balance, either to produce an obligation or to aliene dominion.' Nexum est, ut ait Gallus Aelius, quodcunque per aes et libram geritur, idque necti dicitur; quo in genere sunt haec, testamenti factio, nexi datio, nexi liberatio, Festus, under the word 'Nexum.' 'Nexum, according to Aelius, is any disposition by means of the bronze ingot and balance, including testamentary disposition, formation of contract, discharge of contract.'

As a form of obligation or Contract Nexum was apparently a fiction of a money loan (mutuum, certa pecunia credita): i.e. whatever the origin of the obligation, emptio, locatio, or agreement to pay interest, &c., the debtor was transformed by nexum into a borrower: he was suable by condictio; and if he was condemned and made default in satisfying the judgment he was liable to manus injectio; i.e. to be taken into court in order that the praetor might award personal execution; in other words deliver him as a quasi-slave to the creditor (addicere, duci jubere).

In this function, i.e. as a form of solemn contract based on the fiction of a loan, Nexum was abolished by the lex Poetelia, Livy, 8, 28: in its other functions, as a form of alienation (mancipatio), and a form of extinction of obligation (acceptilatio), Nexum continued to exist in the time of Gaius, 3 § 173. Savigny, Vermischte Schriften, 19.

The subsequent modes of Formal contract, Literal and Verbal, seem like Nexum to have rested on a fiction of a loan of money. We are expressly told this of Expensilation or Literal contract, § 129; and the etymology of Stipulatio (stips=pecunia) seems to show that verbal contract also was originally based on the supposition that money had passed between the creditor and debtor. But though Expensilatio and Stipulatio resembled Nexum in being

fictions of a loan and ground to support Condictio certi, they did not resemble it in rendering the judicatus in such a condictio liable, on default of satisfying the judgment, to personal execution.

The arrangement adopted by Gaius is not without significance. He begins with a Real, that is, a Formless contract, found in the code of Natural law: and from these Real contracts he selects Mutuum, the type, that is to say, which Formal contracts subsequently imitated and feigned. He then proceeds to Formal contracts, Verbal and Literal; and concludes with the remaining class of Formless contracts, namely the Consensual. This is perhaps the chronological, as well as the logical, order in which contracts were developed.

QUIBUS MODIS RE CONTRAHATUR OBLIGATIO.

§ 90. Re contrahitur obligatio velut mutui datione. *quae* proprie in his fere rebus contingit quae [res] pondere, numero, mensura consta*nt*: qualis est pecunia numerata, vinum, oleum, frumentum, aes, argentum, aurum. quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eadem, sed alia eiusdem naturae reddantur: unde etiam mutuum appellatum est, quia quod ita *ti*bi a me datum est ex meo t*u*um fit.

§ 90. Of real contracts, or contracts created by performance, we have an example in loan for consumption, or loan whereby property is transferred. This chiefly relates to things which are estimated by weight, number, or measure, such as money, wine, oil, corn, bronze, silver, gold. We transfer our property in these on condition that the receiver shall transfer back to us at a future time, not the same things, but other things of the same nature: and this contract is called Mutuum, because thereby meum becomes tuum.

§ 91. Is quoque qui non debitum accepit ab eo qui per errorem solvit re obligatur. nam proinde ei condici potest SI PARET EUM DARE OPORTERE, ac si mutuum accepisset. unde quidam putant pupillum aut mulierem cui sine t*u*toris auctoritate non debitum per errorem datum est non teneri condictione, non magis quam mutui datione. sed haec species obligationis non videtur ex contractu consistere, quia is qui solvendi animo dat magis distrahere vult negotium quam contrahere

§ 91. The receiver of what was not owed from a person who pays in error is also under a real obligation, for he may be sued by Condictio with the formula: 'If it be proved that he ought to convey,' just as if he had received the property in pursuance of a loan. And, accordingly, some have held that a ward or female, if their guardian has not authorized them to receive a payment, are not liable to be sued for money paid in error any more than they are for money received as a loan. This, however, is a mistake, as the liability is not founded

on contract, for a payment in order to discharge a debt is intended to extinguish an obligation, not to establish one.

The thing to be restored by the borrower in a loan for consumption was not the specific thing that was borrowed, but some other thing of the same genus. Such members of a genus as are naturally capable of mutual substitution (quae vice mutua funguntur) received from modern civilians the barbarous name of res fungibiles. A more significant barbarism, if any was necessary, would have been res vicariae, from the principal word of the definition. The classical name was neither res fungibilis, nor res vicaria, but Quantitas, Dig. 44, 2, 7, pr.

§ 91. The auctoritas of the guardian was only wanted to supply the will or intention required in a disposition or contract. As Condictio indebiti, the action brought for recovering money paid by mistake, was not founded on disposition or contract, but on the fact that a defendant had been without cause enriched at the expense of the plaintiff, there seems to be no reason why it should not be brought against a ward who receives without his guardian's sanction money to which he is not entitled. Justinian, however, decides against Gaius that the ward is not under the circumstances liable to condictio indebiti, Inst. 3, 14, 1.

The obligation arising by a contract of mutuum is only an obligation to repay the principal of the debt. The loan is regarded as gratuitous; if any interest is intended to be paid, it requires to be secured by an accompanying verbal contract, or stipulation. The repayment of the principal was enforced by the general personal action of condictio.

Connected with the contract of mutuum was the senatusconsultum Macedonianum, named, according to Theophilus, after a parricide, according to some commentators, after a money-lender. This decree passed, according to Tacitus, under Claudius (Annales, 11, 13), according to Suetonius, under Vespasian (Suet. Vesp. 11), prohibited lending money to a person under power (filiusfamilias) without the consent of the father. Verba senatusconsulti Macedoniani haec sunt: Quum inter ceteras sceleris causas Macedo quas illi natura administrabat etiam aes alienum adhibuisset, et saepe materiam peccandi malis moribus praestaret qui pecuniam, ne quid amplius diceretur, incertis nominibus crederet; placere, ne cui qui

filiofamilias mutuam pecuniam dedisset etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitioque daretur; ut scirent qui pessimo exemplo foenerarent, nullius posse filiifamilias bonum nomen expectata patris morte fieri, Dig. 14, 6, 1. 'Whereas to his natural temptations Macedo added indebtedness, and facilities for profligacy are often provided by money-lenders, who, fearing an express prohibition [?] advance money to sons without asking the consent of the father [?]; be it enacted that no loan of money to a filiusfamilias shall be recoverable by action even after the death of the father, in order that unprincipled usurers may despair of acquiring under any circumstances a legal claim.' Neither the age nor the rank of a filiusfamilias affected his incapacity to contract a pecuniary loan. In filiofamilias nihil dignitas facit quominus senatusconsultum Macedonianum locum habeat; nam etiam si consul sit vel cujusvis dignitatis, senatusconsulto locus est, nisi forte castrense peculium habeat, tunc enim senatusconsultum cessabit usque ad quantitatem castrensis peculii, quum filiifamilias in castrensi peculio vice patrumfamiliarum fungantur, Dig. 14, 6, 2. 'No rank takes a person out of the law, nor does even the consulship or any other office remove the disability; but it does not extend to the castrense peculium, for in respect of this a person under power has all the capacities of a paterfamilias.' Julianus scribit, exceptionem senatusconsulti Macedoniani nulli obstare nisi qui sciret aut scire potuisset filiumfamilias esse eum cui credebat, Dig. 14, 6, 19. 'The law can only be pleaded against a lender who knew or might have known that the borrower was a filiusfamilias.' Si tantum sciente patre creditum sit filio, dicendum est cessare senatusconsultum, Dig. 14, 6, 12. 'The mere knowledge (and silent acquiescence) of the father takes a case out of the law.' The disability of the filiusfamilias did not extend to any contract other than a pecuniary loan. Is autem solus senatusconsultum offendit qui mutuam pecuniam filiofamilias dedit, non qui alias contraxit, puta vendidit, locavit, vel alio modo contraxit; nam pecuniae datio perniciosa parentibus eorum visa est, Dig. 14, 6, 3, 3. 'The law only incapacitates the filiusfamilias for receiving a loan of money, not for forming any other contract; for it is the loan of money that was deemed to be dangerous to the parent.' This confirms Savigny's view, that Personal execution with its rigorous incidents, quasi-servitude and incarceration (addici, duci), was confined to the judicatus in an action on a money loan.

By the English law bargains made with expectant heirs and remaindermen, during the lifetime and without the knowledge of the parent, may be set aside by a court of equity on the ground of unfairness or inadequacy. The object of this rule, however, is rather to protect a necessitous borrower against his own improvidence than, as in the senatusconsultum Macedonianum, to remove temptations to parricide.

Besides the mutuum there are four other Real contracts, Commodatum, Depositum, Pignus, Innominate contract; each of which requires a brief notice.

Commodatum, a loan for use, is the gratuitous lending of an article to be used by the borrower. It must be gratuitous, for, if any compensation is to be paid, the transaction ceases to be a commodatum, and becomes a letting and hiring (locatio conductio). A loan for use differs from a mutuum, or loan for consumption, in that it passes no property to the borrower. Accordingly, in a loan for use the specific thing that was lent is to be returned, whereas in a loan for consumption it is only to be returned in kind. Again, in case of destruction by an inevitable accident, as fire, shipwreck, or invasion, in a mutuum the loss falls on the borrower, in a commodatum on the lender. The commentators have expressed this by the formula, res perit domino, 'the loss from destruction falls on the proprietor,' but the maxim only applies to contracts of mutuum and commodatum; for in a sale (emptio venditio), as soon as the obligation is complete, before the property has passed by delivery to the buyer, if the thing is destroyed without the fault of the vendor, the loss falls on the buyer, and he can be compelled to pay the purchase-money, although the subject of sale has never been in his possession. We must not identify the borrower's right to use, which consists in an obligation, with the servitude (jus in re) or fraction of proprietorship called Usus, which is created by other methods and governed by different rules.

Depositum is the delivery of a thing for custody, to be redelivered on demand, without compensation. It is properly gratuitous, for if a compensation is to be given it is a contract of hiring and letting, and not a deposit. The property remains in the depositor; the depositary has sometimes Possession, but, as a rule, merely Detention. The identical thing that was deposited is to be returned, not an equivalent of the same kind or quality, as in mutuum. An involuntary depositor, that is, one under stress

of shipwreck, fire, civil commotion, the fall of a house, can sue in penal damages for twice the value of the deposit. Praetor ait: Quod neque tumultus neque incendii, neque ruinae, neque naufragii causa depositum sit, in simplum, earum autem rerum quae supra comprehensae sunt in duplum judicium dabo, Dig. 16, 3, 1. 'The praetor says in his edict: When neither tumult, fire, the fall of a house, nor shipwreck is the occasion of a deposit, the simple value, otherwise, twice the value, of the deposit shall be recoverable by action.' Sequestration is the deposit of a subject of litigation by consent of parties or order of the court in the hands of a stakeholder (sequester) to abide the result of the trial. When a depositary is bound to restore not a specific thing (idem) but its equivalent, and by a pactum adjectum pays interest for the privilege of using it in the interim; e.g. when a banker pays interest to his depositors; the convention is called Depositum irregulare, and dominion in the thing deposited, as well as possession, passes to the depositary. Dig. 16, 3, 24.

Pignus, pledge, pawn, or mortgage, is the transfer of a qualified property (jus in re aliena) in a thing, movable or immovable, to be held as a security for a debt, and to be retransferred when the debt is satisfied.

There are three forms of Pignus, corresponding to three eras in the development of Roman law, which must be separately examined.

(1) The earliest form of pledge was effected by a nexum, accompanied with a fiducia, or contract for reconveyance. This ceremony was employed in the contract of pledging, in the contract of deposit, and as we have seen, 1 § 132, in the emancipation of children. Fiduciam vero accepit cuicunque res aliqua mancipatur ut eam mancipanti remancipet; velut si quis tempus dubium timens amico potentiori fundum mancipet, ut ei, quum tempus quod suspectum est praeterierit, reddat: haec mancipatio fiduciaria nominatur idcirco quod restituendi fides interponitur, Boethius ad Cic. Top. 10, § 41. 'Fiducia is a thing mancipated under an agreement for remancipation, as when land in a time of danger is conveyed to a powerful friend in trust to be reconveyed when the danger is past. Such mancipation is called fiduciary, from the trust or promise of remancipation.' Fiducia est cum res aliqua sumendae mutuae pecuniae gratia vel mancipatur vel in jure ceditur, Isidor. Orig. V. 25, 23. 'Fiducia is the transfer of a thing by mancipa-

tion or surrender in court as a security for a loan.' Pecuniam adolescentulo grandi foenore, fiducia tamen accepta, occupavisti. Hanc fiduciam commissam tibi dicis, tenes hodie ac possides, Cic. Pro Flacco, 21. 'You lent the youth money at an enormous interest, although secured by mortgage. This mortgage you say is forfeited, and you have taken possession.' The creditor's right of forfeiture or foreclosure (commissio) was gradually limited. A power of sale was inherent in such a mortgage. Si inter creditorem et debitorem convenerit ut fiduciam sibi vendere non liceat, non solvente debitore creditor denuntiare ei sollenniter potest et distrahere: nec enim ex tali conventione fiduciae actio nasci potest, Pauli Sent. 2, 13, 5. 'Notwithstanding an agreement that the pawnee shall have no power to sell the pawn, on default of the pawnor to pay, and after formal notice the pawnee may proceed to sale, nor would such an agreement give the pawnor an action of fiducia.' But the pawnee could not become the purchaser. Debitor creditori fiduciam vendere non potest sed aliis si velit vendere potest, ita ut ex pretio ejusdem pecuniam offerat creditori atque ita remancipatam sibi rem emptori praestat. Si per suppositam personam creditor pignus suum invito debitore comparaverit, emptio non videtur et ideo quandoque lui potest, ex hoc enim causa pignoris vel fiduciae finiri non potest, Pauli Sent. 2, 13, § 3, 4. 'The debtor may sell the pawn to any but the creditor, and paying the creditor with the purchase-money may have the pawn remancipated to himself and convey it to the purchaser. If the pawnee buy in the pawn by means of a collusive bidder, the sale is void, and the pawn may be redeemed at any time, for such a proceeding cannot extinguish the right of the pawnor.'

Mortgage by Mancipatio and Fiducia (see 2 § 60) are illustrated by an inscription on a brazen tablet, recently discovered near the mouth of the Guadalquivir, of which Krueger gives the text and explanation in his Kritische Versuche.

The perforated margins of the tablet still contain the bronze nails by which it was attached to a wall. It is supposed to have belonged at latest to the second century after the Christian era, and to have been suspended in the chamber of a banker (argentarius, 4 § 64). The inscription is supposed not to have been an actual mortgage but the common form of a mortgage, indicating the terms on which the banker was willing to accommodate his customers. It runs as follows:

Dama L. Titi servus fundum Baianum, qui est in agro qui Veneriensis vocatur, pago Olbensi, uti optumus maxumusque esset, sestertio nummo uno, et hominem Midam sestertio nummo uno, fidei fiduciae causa mancipio accepit ab L. Baianio, libripende, antestato. adfines fundo dixit L. Baianius L. Titium et C. Seium et populum et si quos dicere oportet. Pactum conventum factum est inter Damam L. Titi servum et L. Baianium: quam pecuniam L. Baiano dedit dederit credidit crediderit expensumve tulit tulerit sive quid pro eo promisit promiserit spopondit spoponderit fideve quid sua esse jussit jusserit, usque eo is fundus eaque mancipia fiducia essent, donec ea omnis pecunia fidesve persoluta L. Titi soluta liberataque esset, si pecunia sua quaque die L. Titio heredive eius data soluta non esset, tum uti eum fundum eaque mancipia sive quae mancipia ex iis vellet L. Titius heresve eius vellet, ubi et quo die vellet, pecunia praesenti venderet; mancipio pluris sestertio nummo uno invitus ne daret, neve satis secundum mancipium daret, neve [ut] in ea verba, quae in verba satis secundum mancipium dari solet, repromitteret neve simplam neve (duplam).

'To Dama, slave of Lucius Titius (banker and mortgagee), the Baian estate in the municipal territory of Veneria (near the Guadalquivir?) in the village of Olba, free from praedial servitudes (Dig. 21, 2, 75: or, with all its dominant servitudes (?)), in consideration of a single sesterce: likewise the slave Midas in consideration of a single sesterce: to assure the repayment of certain moneys, were conveyed by mancipation by Lucius Baianius (mortgagor) in the presence of A. B. as balance-holder and C. D. as antestatus (p. 113). As abutting on the estate the mortgagor named L. Titius, Caius Seius, the public highway, and—whoever else were proper to be named. The following convention (fiducia) was concluded between Dama, slave of the mortgagee, and the mortgagor. For the money which the mortgagee has advanced or shall advance, has lent or shall lend, has debited or shall debit to the mortgagor, or for which he has become or shall become fidepromissor, sponsor, or fidejussor for the mortgagor, the above mentioned land and the above mentioned slaves shall be a security, until all such moneys due to the mortgagee as lender or paid by the mortgagee as surety shall have been paid or reimbursed by the mortgagor. [Degenkolb conjectures: donec ea omnis pecunia persoluta fidesve L. Titi soluta liberataque esset: 'until all such moneys shall have been repaid to the mortgagee as lender or the mortgagee as surety shall have

been reimbursed or discharged.'] If the moneys on each day that they fall due are not paid to the mortgagee or his heir, then the above named land and slaves, or such of the said slaves as the mortgagee or his heir shall elect, at the place where and at the time when he pleases, may be sold by the mortgagee or his heir for ready money (i.e. for a less price than might be obtained by a sale on credit); and the mortgagee or his heir shall not be compelled to mancipate them for more than a single sesterce (i.e. if, as mancipable things, he aliene them by mancipation, it shall be merely a formal mancipation, not one that would subject him to auctoritas, i.e. liability in case of eviction as warrantor of the title (§ 141, com.) to the vendee); and shall not in pursuance of the mancipation give to the vendee assurance with sureties for the title; nor without sureties (§ 127, com.) covenant with the vendee for single or double compensation in the event of eviction in the terms in which a mancipator gives assurance with sureties (i.e. the mortgagee shall not be bound to make himself liable as warrantor of the title (auctor) to the vendee, either by implication of law or by express covenant, and that either with or without sureties).'

We may assume that further articles bound the mortgagee, on satisfaction of the mortgage debts, to restore the land and slaves to the mortgagor.

(2) Pignus was effected by delivery of possession without the solemnities of mancipatio. The mortgagor continued to be proprietor of the thing pledged. Pignus, manente proprietate debitoris, solam possessionem transfert ad creditorem, Dig. 13, 7, 5, 1. Qui pignori dedit, ad usucapionem tantum possidet; quod ad reliquas omnes causas pertinet, qui accepit possidet, Dig. 41, 3, 16. 'The mortgagor only possesses for usucapion, for all other intents and purposes the mortgagee has possession.'

(3) Hypothecation was effected by mere convention without delivery of possession. It was a pure Alienation of a jus in re, imposing no Obligation. Pignus combined this with Obligations of the mortgagee, conferring a Personal action on the mortgagor.

The action of the mortgagee to recover the thing pledged, called quasi Serviana, hypothecaria, or pignoraticia contraria, was a real action or vindicatio. It was probably an actio arbitraria with a formula in factum concepta (these terms will be explained in Book IV) to something like the following effect: 'If it be proved that such and such land was mortgaged by the defendant to the plaintiff

as security for the payment of such and such a debt, and that such debt has not been paid [factum], do thou, Judex, condemn the defendant in damages to the amount of the loss that the plaintiff shall have sustained, unless at thy order he deliver such land to the plaintiff [arbitrium]; in absence of such proof, pronounce the defendant's absolution.'

Besides the actio Hypothecaria, whereby the rights of the mortgagee were definitively decided, there was an Interdictum Salvianum, 4 § 147, to enable the mortgagee to recover interim or provisional possession of the thing mortgaged pending the definitive litigation. Its formula was probably something like the following: 'If such and such a slave is one of the things respecting which you agreed with the plaintiff that whatever was inducted, illated, imported into such and such land, or was thereon born or produced, should be pledged to the plaintiff to secure the payment of the rent of such land; in that case I prohibit your employment of force to hinder the plaintiff from abducting the slave.' Thus the relation of actio Hypothecaria to interdictum Salvianum would resemble that of Vindicatio to the interdict Utrubi or Uti possidetis, 4 § 148, or that of Hereditatis petitio to the interdict Quorum bonorum, 4 § 144.

Innominate or unnamed contract is a Bilateral convention for reciprocal performances followed by execution on the part of one of the contractors. A bilateral Convention followed by execution is Real; not followed by execution it is Consensual. Bilateral conventions, Real or Consensual, fall into four classes: Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias, Dig. 19, 5, 5, pr. 'There may be conveyance in consideration of conveyance, or conveyance in consideration of performance, or performance in consideration of conveyance, or performance in consideration of performance.' Some of such conventions, though not followed by execution, would give rise to Named consensual contracts, sale, letting, partnership, or mandate; and then would be enforced by the tribunals: while those conventions unaccompanied by execution whose nature excluded them from these appellations, would have no legal validity. Those conventions which to consensus add execution, but fail to satisfy the definitions of the Named Consensual contracts, are thrown into a miscellaneous class called contracts Innominate. To whatever category they belonged, do ut des, do ut facias, facio ut des, facio ut facias, they were enforcible by a civil action called actio in factum praescriptis

verbis. Dig. 9, 5, 15, ibid. 22, ibid. 25. The insertion of the statement of Paulus, that conventions of the class, facio ut des, were not enforcible by this action but only by the action de dolo, Dig. 19, 5, 5, 3, can only be regarded as an oversight of Justinian, producing an antinomy or self-contradiction of the law.

The binding virtue of execution or delivery (traditio) was one of the oldest principles of Roman law. In traditionibus rerum, quodcunque pactum sit, id valere, manifestissimum est, Dig. 2, 14, 48 (from the commentary of Gaius on the Twelve Tables): and this principle was, perhaps, the basis of the ordinance, Cum nexum faciet mancipiumque, uti linguâ nuncupassit, ita jus esto: which afterwards remained in force when the traditio in a disposition by Nexum was merely symbolic.

The actio in factum praescriptis verbis was so denominated because, in the absence of a generic name for the contract, the fact begetting the obligation was detailed at length in the demonstratio of the formula: Actio quae praescriptis verbis rem gestam demonstrat, Cod. 2, 4, 6. Hence it is often called actio in factum praescriptis verbis. This, however, is a misleading name, because it might lead us to suppose that the formula had an intentio in factum. But it is a civil action, and the formula contains the word 'oportet' (quidquid ob eam rem illum illi dare facere oportet), that is to say, has an intentio in jus. The name of this Roman action ex contractu may be illustrated by a comparison with the name of an English action ex delicto, trespass on the case, so named from the comparative particularity with which the circumstances of the plaintiff's case are detailed in the written allegations. It is sometimes called actio civilis *incerti* because it is brought to recover *damages* (quanti interest).

Examples of Innominate contract are Exchange (permutatio), Dig. 19, 4; Compromise (transactio), Dig. 2, 15; Cod. 2, 4; Conditional sale (aestimatum), that is to say, a promise to pay a certain price for an article if the promisor succeeds in reselling it at a profit, with a power, in the opposite event, of returning the article to the promisee, Dig. 19, 3; and Permissive occupancy (precarium), or permission, at the request (precibus) of the grantee, to use an article without compensation, with a proviso for redelivery on demand. The precarious grantee (precario rogans), as a rule, has Possession, but by special agreement may have mere Detention; whereas the borrower for use (commodatarius) in every case has

only Detention. Itaque cum quid precario rogatum est, non solum hoc interdicto uti possumus, sed etiam praescriptis verbis actione quae ex bona fide oritur, Dig. 43, 16. 'The grantor can recover possession either by the interdict de precario or by the equitable action praescriptis verbis.'

This was an equitable action (ex fide bona) to recover not merely the value conveyed, but also damages for the loss sustained by the plaintiff from default of specific performance. When the executed part of the convention was a conveyance, if restitution was a sufficient compensation, the thing conveyed might be recovered back by condictio causâ datâ, causâ non secutâ, i. e. a suit to recover property conveyed for a consideration which has failed. In qua actione (i. e. si rem do ut rem accipiam) id venit, non ut reddas quod acceperis, sed ut damneris mihi quanti interest meâ illud de quo convenit accipere; vel si meum recipere velim, repetam quod datum est, quasi ob rem datum, re non secuta, Dig. 19, 5, 5, 1. 'Praescriptis verbis is brought to recover, not restitution, but damages equal to the plaintiff's interest in a specific performance. Restitution may be enforced by a suit for reconveyance upon failure of consideration.'

It may illustrate the Roman conception of Innominate or Real contract if we indicate the change that has supervened in this matter from the greater force that is conceded to mere convention (nuda voluntas) in modern jurisprudence.

With the Romans the execution by one of the parties of his part of an Innominate bilateral convention was essential to its efficacy. This execution differentiated the convention from a nudum pactum and gave it validity, but, naturally, only against the party who had not executed. The party who had executed was not similarly bound: he had a right of abandoning the contract and recovering back what he had delivered, not merely when the counter-execution was not made at the time appointed, or had become impossible by the culpa of the other party, or had been always impossible (condictio ob causam non secutam); but when the party who had delivered simply changed his inclination (condictio ex mera poenitentia).

In German jurisprudence, on the contrary, where every pactum is treated as if it had been accompanied by Stipulation, that is, had the validity given by Form—where, in other words, no pacta are nuda, all are vestita—a convention is enforcible irrespectively of its part-execution: it is enforcible irrespectively of execution against

both parties alike, who herein stand on precisely the same footing: that is to say, the party who has delivered what he had to deliver has no right to recover it back either ex mera poenitentia, or ob causam non secutam, but merely the power to compel the other party to a corresponding performance. Vangerow, § 599.

DE VERBORUM OBLIGATIONE.

§ 92. Verbis obligatio fit ex interrogatione et responsione, velut: DARI SPONDES? SPONDEO; DABIS? DABO; PROMITTIS; PROMITTO; FIDE PROMITTIS? FIDE PROMITTO; FIDE IUBES? FIDE IUBEO; FACIES? FACIAM.

§ 93. Sed haec quidem verborum obligatio: DARI SPONDES? SPONDEO, propria civium Romanorum est, ceterae vero iuris gentium sunt; itaque inter omnes homines, sive cives Romanos sive peregrinos, valent. et quamvis ad *Gra*ecam vocem expressae fuerint, velut hoc modo: [δώσεις; δώσω· ὁμολογεῖς; ὁμολογῶ· πίστει κελεύεις; πίστει κελεύω· ποιήσεις; ποιήσω]; etiam haec tamen inter cives Romanos valent, si modo Graeci sermonis intellect*u*m habeant. et e contrario quamvis Latine enuntientur, tamen etiam inter peregrinos valent, si modo Latini sermonis intellectum habeant. at illa verborum obligatio: DARI SPONDES? SPONDEO, adeo propria civium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transf*er*ri possit; quamvis dicatur a Graeca voce figurata esse.

§ 94. Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, velut si Imperator noster principem alicuiu*s* peregrini populi de pace ita interroget: PACEM FUTURAM SPONDES? vel ipse eodem modo interrogetur. quod nimium subtiliter dictum est; quia si quid adversus pactionem fiat, non ex

§ 92. A verbal contract is formed by question and answer, thus: 'Art thou sponsor to me for the conveyance?' 'I am sponsor to thee for the conveyance.' 'Wilt thou convey?' 'I will convey.' 'Dost thou pledge thy credit?' 'I pledge my credit.' 'Dost thou bid me trust thee as guarantor?' 'I bid thee trust me as guarantor.' 'Wilt thou perform?' 'I will perform.'

§ 93. The formula: '"Art thou sponsor?' 'I am sponsor,"' is only valid between Roman citizens; the others belong to gentile law, and bind all parties, whether Romans or aliens, and, if understood, bind Romans when expressed in Greek, and aliens when expressed in Latin. The formula, 'Art thou sponsor?' is so peculiarly Roman that it cannot be expressed in Greek, though the word 'sponsor' is said to have a Greek origin.

§ 94. According to some, there is one case in which an alien may be bound by this word, namely, when a Roman emperor in concluding a treaty thus interrogates a foreign sovereign: 'Art thou sponsor for peace?' and a Roman, they hold, may similarly be bound to an alien. But this is a miscon-

stipulatu agitur, sed iure belli res vindicatur.

§ 95. Illud dubitari potest, si quis [*desunt* 24 *lin.*]

§ 96. .... obligentur: utique *cum* quaeritur de iure Romanorum. nam aput peregrinos quod iuris sit, singularum civitatium iura requirentes aliud in *alia* lege re*perimus*.

ception, for the violation of a treaty between sovereign states is not redressed by the legal process of a suit founded on stipulation, but by martial process and the arbitrement of the sword.

§ 95. ....

§ 96. [Gaius perhaps observed that the FORMS prescribed by law, under pain of nullification, for Contracts, Wills, and any other Dispositions belong to the Civil, National, or Local, as opposed to the Gentile, Cosmopolitan, or Universal ingredients of each particular code].

§ 92. Before we proceed to examine Formal, that is to say, Verbal and Literal contracts, it is desirable, at the risk of some repetition, to review the general nature of Title.

A Title is a fact, incident, or event, to which the law annexes a right or obligation; or it is a fact by which the law confers a right or imposes an obligation on a person; or it is an incident through which the law invests a person with a right or obligation; or, extending its function, it is an event which gives a beginning or puts an end to a right or obligation; it is a fact, incident, or event, whereby the law invests with a right or divests of a right; or a fact, incident, or event, whereby the law burdens us with an obligation or exonerates from an obligation.

When this fact is a lawful act designed to invest in the mode prescribed or permitted by the legislator certain persons with certain rights and obligations, it is called a Disposition (Rechtsgeschaeft). Dispositions, e. g. contract, release, alienation, emancipation, adoption, marriage, testation, succession, joinder in issue (litis contestatio), &c. are as diversified in character as are the parts of the statute book of which they are applications: but nevertheless have many common or generic features which demand, what they have not received in text books of English jurisprudence, a common examination.

The rights conferred through a title may be jura in rem, available against all the world, including both rights of status and rights of property; or jura in personam, available only against a determinate person. It is with the latter that we are at present concerned.

The facts called Titles, whether they confer a jus in rem or a jus in personam, are never absolutely elementary,—are always decomposable into a bundle of more elementary facts. Nevertheless, and with this reservation, Titles may be divided into such as are comparatively simple, and such as are comparatively complex.

The bundle of facts composing a comparatively complex Title can usually be divided into two portions, one of which may be called principal or essential, the other secondary or adventitious.

For instance, in the bundle of facts composing an alienation, or creating a jus in rem, the essential or principal portion is the free will and intention of the alienor to divest himself of a right and invest the alienee with it, and the acceptance of the proffered right by the alienee: the accessory and adventitious portion is the signification of these intentions by the execution of a certain written instrument or deed, and their completion by the solemn delivery and acceptance of seisin or possession.

A Formal Disposition is one for which, under pain of nullification, the necessary or exclusively valid form of expression or manifestation of intention is prescribed by the legislator. A Formless Disposition is one where the individual is free to choose the form of expressing, or mode of manifesting, his intention.

These accessory formalities and solemnities are ancillary to the essential purpose of the transaction, being destined partly to prevent rash and inconsiderate engagements, partly to furnish evidence and proof of the convention or principal part of the transaction.

Indeed, the accessory portion of the Title may contain an element still more remotely and casually connected with the principal transaction, such as the stamp affixed to the document executed by the parties. The stamp in no way contributes to the purpose and intention of the parties, but the legislator makes it necessary to the validity of the transaction from financial motives, for the sake, namely, of the public revenue.

Setting aside this purely arbitrary addition to the Title, we may say that the function of the Title is not only to be the antecedent to which the law annexes as a consequent a certain right or obligation, but also to be a sign, badge, or manifestation, to denote to the world the person in whom a right has vested, or on whom an obligation has become incumbent.

The peculiar characteristic of Formal, that is to say, Verbal and Literal contracts, is this: evidentiary solemnities compose in these

contracts an indispensable part of the title to a jus in personam. The Formless contracts, namely, the Real contracts, of which we have already treated, and the Consensual contracts, of which we shall treat hereafter, cannot, indeed, be enforced in a court of law unless they are proved to have been concluded, unless, that is, evidence be given of their existence. But the contract and the evidence of the contract are distinct and independent. In Formal contracts a preappointed evidence of the essential portion of the contract, that is, of the intention of the promisor and expectation of the promisee, is made by the legislator a constituent accessory element of the contract or title itself. It is not perfect or complete without this evidence. If the transaction did not include certain preappointed evidentiary formalities, the Verbal or Literal contract has never been formed and does not exist.

§ 93. Why was Sponsio binding on Romans and not on strangers? Possibly because originally it was an oath or adjuration of the tutelary gods of Rome, who would not be an object of reverence to a stranger.

§ 94. The obligation of an independent sovereign state to another independent sovereign state does not resemble the obligation of one subject to another subject of the same sovereign or political superior. If a contract between two subjects is broken, it is enforced by the power of the common sovereign. But if a treaty between two sovereigns is violated, there is, by hypothesis, no common superior by whom it may be enforced. The treaties of sovereign states correspond to the moral obligations of individuals. They may be binding in the forum of conscience or of heaven, but, if these are disregarded, are not enforced by any earthly tribunal. The moral obligation is not secured by any legal sanction; and the sovereign whose treaty rights are violated can obtain no redress except from his own power of inflicting evil on the violator.

Or we may compare the relation of sovereign states to the relation of individuals before the complete establishment of political society. There is then sufficient intercourse to form a public opinion and certain conceptions of rights and wrongs; but not sufficient organization to dispense with the necessity of self-vindication or self-defence. In such a state the redress of the individual for the harms he suffered was by feud or private war. That such a state once existed we know from the early history of our ancestors and their Teutonic kinsmen. So the redress of

sovereigns is war or public feud. In the controversies of individuals the system of private war was abolished in this country by the proclamation of 'the king's peace,' renewed at every coronation—the symbol of the consolidation of central authority. For the controversies of peoples no such abrogation of warlike process seems possible.

Jus in the expression jus belli appears to signify not right or law but sanction, or executive power, or means of compulsion. That this was one of the many meanings of the word appears from Ovid, who uses the following terms to express a want of self-control: Nam desunt vires ad me mihi jusque regendum. Amor, 2, 4.

The necessity of employing any consecrated terms in a stipulation was abrogated by a constitution of Leo, dated the calends of January, A. D. 469. Omnes stipulationes, etiamsi non solennibus vel directis sed quibuscunque verbis consensu contrahentium compositae sunt [vel], legibus cognitae suum habeant firmitatem, Cod. 8, 38, 10. 'Stipulations, though not in consecrated formulas or direct terms, in whatever words the agreement of the parties is expressed, if otherwise legal, shall have binding force.'

It appears from the epitome of Gaius, contained in the laws of the Visigoths (Breviarium Alarici), that Gaius proceeded to mention two modes of verbal obligation without previous interrogation, the dotis dictio, and the jurata promissio liberti. Dotis dictio was the declaration of a wife, or her father, or her debtor, settling a dotal estate, movable or immovable, on the husband. Jurata promissio liberti was the sworn promise of a freedman, immediately after his manumission, to render certain services (operae) to his patron. It was usual to bind the conscience of the slave by a similar promise before manumission; but such a promise had no legal operation.

DE INUTILIBUS STIPULATIONIBUS.

§ 97. Si id quod dari stipulamur tale sit, ut dari non possit, inutilis est stipulatio: velut si quis hominem liberum quem servum esse credebat, aut mortuum quem vivum esse credebat, aut locum sacrum vel religiosum quem putabat *esse* humani iuris *sibi dari* stipuletur.

§ 97*a*. *item si quis rem quae in rerum natura non est aut esse non potest, velut hippocentaurum stipuletur,* aeque inutilis est stipulatio.

§ 97. The impossibility of a stipulated conveyance vacates the stipulation; for instance, if a man stipulates for the conveyance of a freeman whom he supposes to be a slave, or of a dead slave whom he supposes to be alive, or of ground devoted to the celestial or infernal gods which he supposes to be a subject of commerce, or of a non-existent thing, such as a hippocentaur, the stipulation is void.

§ 98. Item si quis sub ea condicione stipuletur quae existere non potest, *vel*uti si digito caelum tetigerit, inutilis est stipula*tio*. sed legatum sub inpossibili condicione relictum nostri praeceptores proin*de valere* putant, ac si *ea condicio adiecta non* esset: divers*ae* sc*h*olae auctores non minus legatum inutile existimant, quam stipulationem. et sane vi*x* idonea diversitatis ratio reddi potest.

§ 98. An impossible condition, that the promisee, for instance, should touch the sky, makes the stipulation void, although a devise with an impossible condition, according to the authorities of my school, has the same effect as if the condition were not annexed. According to the other school it is as null and void as if it were a stipulation, and in truth no satisfactory reason can be alleged for making a distinction.

§ 99. Praeterea inutilis *est stipulatio, si quis* ign*orans rem suam* *esse eam sibi dari stipuletur; nam* id quod al*i*cu*i*us est, id ei dari non potest.

§ 99. So a stipulation to convey the promisee's property to the promisee is null and void, for the conveyance is impossible.

§ 100. Denique inutilis est talis stipulatio, si quis ita dari stipuletur: POST MORTEM MEAM DARI SPONDES? vel ita: *POST MORTEM TUAM DARI SPONDES? valet autem, si quis ita dari stipuletur: CUM MORIAR DARI SPONDES? vel ita:* CUM MORIERIS DARI SPONDES? id est ut in novissimum vitae tempus stipulatoris aut promissoris obligatio conferatur. nam inelegans esse visum est ex heredis persona incipere obligationem. rursu*s* ita stipulari non possumus: PRIDIE QUAM MORIAR, *a*ut: PRIDIE QUAM MORIERIS, DARI SPONDES? quia non potest aliter intellegi pridie quam aliquis morietur, quam si mors secuta sit; rursus morte secuta in praeteritum redducitur stipulatio et quodammodo talis est: HEREDI MEO DARI SPONDES? quae sane inutilis est.

§ 100. A stipulation to convey after the death of the promisee or promisor is invalid, but a stipulation to convey at the death, that is, at the last moment of the life of the promisee or promisor, is valid. For it has been held anomalous to make the successor of either of the contracting parties the first subject of the obligation. Again, a stipulation to convey on the day before the death of the promisee or promisor is invalid, for the day before the death cannot be ascertained till after death, and after death the time is past for performance to the promisee, and the stipulation amounts to a promise to convey to the promisee's successor, which is void.

§ 101. Quaecumque de morte diximus, eadem et de capitis diminutione dicta intelleg*e*mus.

§ 101. What is said of death must also be understood of loss of status.

§ 102. Adhuc inutilis est stipulatio, si quis ad id quod interrogatus erit non responderit: velut si sestertia X a te dari stipuler, et tu *nummum* sestert*ium* V m*ilia* promittas: aut si ego pu*r*e stipuler, tu

§ 102. Another cause of nullity is the want of correspondence between the question and answer; if I stipulate, for instance, for ten thousand sesterces and you promise five thousand, or if you meet my abso-

sub condicione promittas.

§ 103. Praeterea inutilis est stipulatio, si ei dari stipulemur cuius iuri subiecti non sumus: unde illud quaesitum est, si quis sibi et ei cuius iuri subiectus non est dari stipuletur, in quantum valeat stipulatio. nostri praeceptores putant in universum valere, et proinde ei soli qui stipulatus sit solidum deberi, atque si extranei nomen non adiecisset. sed diversae scholae auctores *dimidium ei deberi* existimant, pro aliena . . . [*desunt* 4 *lin.*]

§ 104. *Item inutilis est* stipulatio, *si* ab *eo stipuler qui iuri meo sub*iectus est, *vel si* is a me *stipuletur*. *sed de servis et de his qui in* mancipio *sunt illud praeterea ius observatur*, *ut* non solum ipsi *cuius in potestate mancipiove* sunt obligari non pos*sint*, sed ne alii quidem ulli.

§ 105. Mutum neque stipulari neque promittere posse palam *est*. *Quod et* in surdo receptum est: quia et is *qui stipulatur* verba promittentis, et qui promittit, *verba stipulantis* exaudire debet.

§ 106. Furiosus nullum ne*gotium gerere potest*, quia non intellegit quid agat.

§ 107. Pupillus omne negotium recte gerit: ita tamen ut *tutor*, sicubi tutoris auctor*itas ne*cessaria sit, *ad*hibeatur, velut si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest.

§ 108. Idem iuris est in feminis quae in tutela sunt.

§ 109. Se*d* quod diximus de pupilli*s*, utique de eo verum est qui iam aliquem intellectum habet: nam infans et qui infanti proximus est non multum a *furioso* differt, quia huius aetatis pupilli nullum intellectum habent: sed in his pupillis per utilitatem benignior iuris interpretatio facta est.

lute stipulation by a conditional promise.

§ 103. No valid stipulation can be made to convey to a person who has not power over the stipulator, whence the question has been mooted to what extent a stipulation for payment to the stipulator and a stranger is valid. My school hold that it is valid for the whole sum stipulated, and that the stipulator is entitled to the whole, just as if the stranger had not been mentioned. The other school hold that he is only entitled to the moiety.

§ 104. No valid stipulation can be made between a person under power and the person to whom he is subject. A slave and a person in mancipation can incur an obligation neither to the person in whose power or mancipation they are, nor to any other person.

§ 105. The dumb cannot stipulate or promise, nor can the deaf, for the promisee in stipulation must hear the answer, and the promisor must hear the question.

§ 106. A lunatic cannot enter into any contract because he has no judgment of consequences.

§ 107. A ward can enter into any contract provided that he has his guardian's authority when necessary, as it is for incurring an obligation, although not for imposing an obligation.

§ 108. The same rule applies to women who are wards.

§ 109. This concession of legal capacity to wards is manifestly reasonable in respect of children approaching the age of twelve or fourteen; and children who have only just completed their seventh year, though resembling lunatics in want of intelligence, are permitted, with a view to their interests, to have the same capacity as those approaching twelve or fourteen.

§ 97. A stipulation was inutilis, i. e. originally (ipso jure) null and void, which conferred no right on the promissee even though the promissor alleged no counter right (exceptio). When this was clear, the praetor would not permit the promissee to sue (actionem denegare), Dig. 45, 1, 27. A penal clause would generally (see note to § 103 for an exception) give no validity to a stipulation otherwise void. Si homo mortuus sisti non potest, nec poena rei impossibilis committetur, quemadmodum si quis Stichum mortuum dari stipulatus, si datus non esset, poenam stipularetur, Dig. 45, 1, 69. 'A slave deceased cannot be produced, and a penal sum annexed to the breach of an impossible condition, for instance, the conveyance of a deceased slave, is not forfeited.'

Among the objects that could not be secured by stipulation, and still less by any Formless contract, are Dispositions under the code of Family law (the laws governing domestic relations) or the code of Succession. E. g. no promise of marriage (sponsalia) was legally binding—a striking contrast to the rule of English law. Nor do we hear of any binding agreement to a future Emancipation, Adoption, or Arrogation; or for the principal acts relating to the law of Succession, to the execution of a Will or to the aditio of an inheritance. In all these solemn Dispositions the Roman legislator deemed it expedient that the disposer should have an entire freedom of choice at the moment of making the Disposition.

§ 98. This seems an appropriate place for the following remarks on the general nature of conditions. A Condition is an element of Title; it is a certain contingent occurrence or non-occurrence, performance or non-performance, by arbitrary appointment conferring on a certain person a certain right, or imposing on him a certain obligation. It may be defined as the middle term (B) of a syllogism of which the minor term (C) represents a person, and the major term (A) a right or obligation, and of which both the premisses are Contingent. It is the last feature that we shall first proceed to consider.

The major premiss must be contingent; it must be an arbitrary determination that makes the right or obligation (A) depend on the given title (B); the nexus between the middle and major terms must be solely the will of the testator or contractors, not the will of the legislator; the title must not be in its own nature the Necessary presupposition of the right. E. g. in the following cases: the institution of a person as heir, *if he survive the testator, if he accept*

the inheritance; the bequest of a legacy, *if the heir accept the inheritance;* the promise of a dower, *if the marriage is celebrated;* the seeming condition is required by the law, and its expression is superfluous: such an event, therefore, is not a genuine condition. Again, the nexus between the minor and middle terms may be either the will of the person entitled (conditio potestativa, Cod. 6, 51, 7), or chance (conditio casualis); but one way or other the minor premiss must be contingent; the fulfilment of the condition must be neither Necessary nor Impossible: it must be a future and uncertain contingency whether the title (B) shall be realised or fulfilled in respect of a given person (C). The condition, accordingly, must not be a past or present event, e. g. *if Titius was consul last year, if Titius is now consul;* such a fact is now certain and Necessary, and any disposition contingent thereon is really unconditional.

The effect of an Impossible condition is different in Contracts and Testamentary dispositions; it invalidates contract; whereas in a testament it is deemed unwritten (pro non scripto habetur), and the disposition is regarded as unconditional. This was the rule that finally prevailed: Obtinuit, impossibiles conditiones testamento adscriptas pro nullis habendas, Dig. 35, 1, 1, 3. 'It has been finally decided that impossible conditions to testamentary dispositions are mere surplusage.' This was the doctrine of the Sabinians, and was confirmed by Justinian, Inst. 2, 14, 10. Illegal and immoral conditions followed the same rule as impossible conditions. The question why Contracts and Wills were governed by different rules, which Gaius admits to be obscure, may receive some light from the following considerations. Testamentary dispositions in their nature are acts of liberality on the part of the testator. Even when he employs them as inducements to an illegal or immoral act, it is not quite certain that the refusal to perform the act would deprive the devisee of his liberality. At all events, the devisee is innocent of unlawful intention, and the same cannot be said of the contractor who is guilty of an agreement to violate the law. Accordingly, the law aids the devisee but not the contractor; and the rule, once established for immoral conditions, was extended to impossible conditions.

On this point the French code agrees with the Roman law. In the Austrian code the Proculeian doctrine is followed: i. e. testamentary dispositions as well as contracts are invalidated by im-

moral or impossible conditions. The Prussian code follows a middle course: impossible conditions invalidate a testamentary disposition; immoral conditions are deemed unwritten and the disposition is construed as unconditional.

A Condition was not annexable to all dispositions. It was annexable to all Testamentary dispositions: but among dispositions inter vivos the only ones to which it could, at least in the earlier jurisprudence, be annexed were Obligations. A Condition could not be annexed to an In jure cessio or judicial surrender: Nulla legis actio prodita est de futuro, Frag. Vat. 49. Nor to Mancipatio, nor to Acceptilatio, nor to Expensilatio (Literal Obligation) nor to Cognitoris datio. Sub conditione cognitor non recte datur, non magis quam mancipatur, aut acceptum vel expensum fertur, Frag. Vat. 329. Nor could it be annexed to magisterial Tutoris datio: Sub conditione a praesidibus provinciarum non posse dari tutorem placet, et si datus sit nullius esse momenti dationem, Dig. 26, 1, 6, 1: nor to Tutoris auctoritas, Dig. 26, 8, 8: nor to hereditatis aditio, nor to servi optio: Actus legitimi qui non recipiunt diem vel conditionem, veluti mancipatio, acceptilatio, hereditatis aditio, servi optio, datio tutoris, in totum vitiantur per temporis vel conditionis adjectionem, Dig. 50, 17, 77.

Later jurisprudence admitted the annexation of conditions to the alienation of property by means of Tradition. Conditions are Suspensive or Resolutive. Tradition coupled with a Suspensive condition operates an immediate transfer of possession and a future transfer of ownership contingent on, and contemporaneous with, the fulfilment of the condition, p. 202. Tradition, coupled with a Resolutory condition, operates two transfers of ownership: an immediate transfer of ownership and a subsequent retransfer of ownership, contingent on, and contemporaneous with, the fulfilment of the condition. The retransfer of dominion follows without any retradition or reconveyance by the interim proprietor; and the remedy of the original proprietor is not condictio, implying the necessity of reconveyance, but vindicatio, implying that he is already reinvested with dominion. The justa causa or disposition which accompanies the tradition and determines the transfer of property (2 § 20), also limits the duration of the property so transferred. Such at least is the doctrine of the majority of jurists: others hold that the fulfilment of the resolutive condition only imposes on the transferree a personal obaligtion of reconveyance.

Conditions annexed to contracts have the following difference from conditions annexed to testamentary dispositions and dispositions translative of dominion. Conditions annexed to contract are retroactive: the obligation determined by their fulfilment relates backward and dates from the date of the contract. Conditions annexed to legacy or to alienation are not retroactive: the obligation or ownership thereby conferred only dates from the fulfilment of the condition.

We have seen that conditions were excluded from Expensilatio or Literal contract: it was their admissibility in Stipulatio that made the latter, unlike Expensilatio, a generic or universal form of contract: a contract equally applicable whatever the object that the contractors desired to secure. Primitive jurisprudence only recognized stipulations whose object was a datio or conveyance of property; not stipulations whose object was a factio or non-factio, some other kind of performance or forbearance. But when facere or non facere was allowed to form the Condition of an obligation whose object was a dare, that is, when the payment of a penal sum could be made contingent on the non-performance or performance of a certain act, it became possible to stipulate, virtually or indirectly at least, for factio or non-factio as well as for datio. Savigny, § 116, Ihering, Vangerow, § 93.

§ 100. As to the rights conferred or obligations imposed by a contract on third persons not parties to the contract Paulus lays down the following principle: Quaecunque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostra persona obligationis initium sumant, inanem actum nostrum efficiunt: et ideo neque stipulari neque emere vendere contrahere, ut alter suo nomine recte agat, possumus, Dig. 44, 7, 11, i.e. in every contract where the apparent contractors are the real contractors, i.e. are not agents but principals, the right created by the contract must primarily vest, if the contract is to be valid, in the promisee himself; and the obligation in the promisor himself. This rule is evidently not violated if the promisee associates to himself his heir, i.e. contracts for some right to himself and heir: Suae personae adjungere quis heredis personam potest, Dig. 45, 1, 38, 14: but it is violated if the promisee contracts for some right to vest exclusively in his heir, or, as expressed in this paragraph, for some performance post mortem suam. Such contracts accordingly were void, whether they belonged to the civil or the gentile code, § 158. This led to

the introduction of an Adstipulator when a person wished to stipulate something exclusively for the benefit of his heir, § 117. When Justinian abrogated the rule and ordained that an act could be Contracted to be performed either before or after the death of either of the contractors, Cod. 4, 117, the Adstipulator became unnecessary.

The rule of Paulus would make a promise of payment to the promisee and a stranger void as to the latter, § 103.

The same rule applied to the passive obligation a contract imposed: the debtor created by a contract could not be in the first instance the heir of the promisor, § 158. One intelligible motive for prohibiting obligations from taking effect on the death of the promisor would be to prevent evasions of the testamentary laws restricting the powers of testation. A testator who wished to leave a legacy to a person who could not take under a will from want either of Capacitas or of passive Testamentifactio, or a legacy beyond the amount permitted by the lex Falcidia or some other law, would enter into a Stipulation, binding his heir to pay a certain sum after the death of the promisor. The promisee then could recover this sum not as legatee but as creditor under the stipulation. That such evasions were in fact attempted appears from Dig. 22, 3, 27. Ihering. Is this opening of a door to fraudulent evasions the evil that Gaius intends to express by 'Inelegance,' a somewhat unintelligible term? Justinian, however, abolished the distinctions recorded in this paragraph, and allowed the stipulation of an act to be performed either for the heir of the promisee, or by the heir of the promisor, Inst. 3, 19, 13.

§ 103. A slave or filiusfamilias who stipulated a payment to himself acquired an obligation for the master or paterfamilias. He could also stipulate directly a payment to the master or parent. Except in these relations, it was the rule that a man could not stipulate for payment to a third person. Payment, however, to a third party might be secured by a penal clause, stipulating, in default of performance, payment of a penal sum to the promisee, Inst. 3, 19, 19.

The rule of the Civil law that a Formal contract could only be concluded between principals—between persons covenanting in their own names, was an impediment in the way of commerce which was met, as we have already stated, by a double use of a Consensual contract, which will presently be examined, the contract of Agency (mandatum). An Agent or mandatary stipulated in his

own name with a third person, and then ceded his right of action to his principal; that is, made his principal his mandatary: the principal then sued and recovered on the stipulation as Cessionary of the action, that is, as mandatary of his mandatary. In the latest period the actual Cession of the action was unnecessary: the praetor allowed the principal to sue by an actio Utilis, i. e. an action whose formula contained a Fiction, with whose precise nature we are unacquainted, but perhaps to the effect that the principal was the universal successor of the agent. In respect of Formless contracts, or contracts governed by Jus Gentium, the institute of Agency was more completely recognized. If an Agent merely acted as emissary (nuncius) and instrument (minister) of his principal, that is, contracted in the name of his principal, the principal acquired an immediate right against the third contractor and incurred a direct obligation to him: he could sue him or be sued by him in an actio Directa—he was not driven to an actio Utilis or Fictitia. In this respect the distinction between Formal and Formless contracts may be thus expressed: in Formal contracts the Civil law requires both elements of the Title or Disposition, the essential element (intention to create an obligation) and the symbolic element (the declaratory question or answer) to be acts of the same person: in Formless contracts Gentile law allows these elements to be sundered; allows the essential part (intention) to be the act of one person, the Principal, and the declaratory part (the formless external manifestation of this intention) to be the act of another person, the Agent.

If then it was desired to contract for payment to a third person, it was only necessary that the contractor should not attempt to do as principal what he could only do as agent, or to do without Cession what could only be done by means of Cession. Even if he neglected these precautions it did not inevitably follow that his contract was inefficacious. Paulus, indeed, Dig. 44, 7, 11, lays down the principle which we have already, § 100, noticed: 'Every disposition in which a person contracts as principal but attempts to entitle a third person to sue as principal (i. e. attempts to invest a third person with the rights of an immediate creditor) is invalid: and neither by formal contract of stipulation, nor by formless contract of purchase and sale, nor by any other contract in which I am principal can I invest a third person with a right to sue in his own name.' But this rule was not so important as at first sight it

might appear: for if the third person by subsequent ratification made the contractor his negotiorum gestor, i. e. his representative or agent (procurator), the contract became valid. Savigny, Obligation, § 59. We have already mentioned, § 100, that in Justinian's legislation a contractor could contract for a payment to or by a third person, when that person was his own successor.

The controversy between the Sabinians and Proculeians is decided in favour of the latter by Justinian, who enacts that a stipulation for payment of a sum to the promisee and a stranger entitles the promisee to payment of half the sum and is void as to the remainder, Inst. 3, 19, 4. In a Formless contract the Sabinian doctrine still prevails, Dig. 18, 1, 64.

§ 109. The age of puberty, as we have seen, was 14 for males, 12 for females. Before this period the child was called impubes: up to the age of 7 he was called infans. In the interval between 7 and 14 he was described either as infantiae proximus or as pubertati proximus. According to some commentators the interval was equally divided between these appellations, so that from 7 to 10½ a boy was infantiae proximus, and from 10½ to 14 pubertati proximus. According to Savigny these names only covered the space of a year measured from each limit, so that from 7 to 8 a child was infanti proximus, from 13 to 14 puberi proximus, and from 8 to 13 without any distinctive appellation.

The principal peculiarity that results from the nature of verbal and literal contracts and distinguishes them from other conventions is, that other conventions are not legally valid unless the promisor be shown to get a quid pro quo, that is, unless an adequate consideration be proved: whereas verbal and literal contracts, securing by the solemnity of their formalities due deliberation on the part of the contractors, are valid in favour of the promisee without proof of consideration.

Although, however, the want of consideration did not absolutely invalidate a stipulation, yet it constituted a counterpoising right of the promisor which might be pleaded by the exceptio doli mali or non numeratae pecuniae. Si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur, exceptio utique doli mali ei nocebit. Licet enim eo tempore quo stipulabatur nihil dolo malo admiserit, tamen dicendum est eum, cum litem contestatur, dolo facere qui perseveret ex ea stipulatione petere, Dig. 44, 4, 2, 3. 'The absence of consideration renders an action on a stipulation liable to be

barred by a plea of fraudulent intention. For though originally the stipulation was not tainted with fraud, yet to sue on such a stipulation is fraudulent.' The exception of dolus malus was allowed by Marcus Aurelius (A.D. 169–176) to be pleaded in all actions of civil law. Sed et in strictis judiciis, ex rescripto divi Marci, opposita doli mali exceptione, compensatio inducebatur, Inst. 4, 6, 30. 'Even in actions of civil law, after the rescript of Marcus Aurelius, the plea of dolus malus forced the plaintiff to recognize any set-off to his claim.'

If instead of generally alleging fraud (Si in ea re nihil dolo malo Auli Agerii factum est neque fit), the plea alleged the particular fact of non-payment (exceptio in factum composita), it was called exceptio pecuniae non numeratae. Compare Gaius, 4 § 116: Si stipulatus sim a te pecuniam, tanquam credendi causa numeraturus, nec numeraverim . . . . placet per exceptionem doli mali te defendi debere, with Just. Inst. 4, 13, 2: Si quis, quasi credendi causa, pecuniam stipulatus fuerit, neque numeraverit . . . . placet per exceptionem pecuniae non numeratae te defendi debere.

An important peculiarity of these exceptions was that the burden of proof was not, as in other exceptions, on the defendant, but on the plaintiff. Si ex cautione tua, licet hypotheca data, conveniri coeperis, exceptione opposita seu doli seu non numeratae pecuniae, compellitur petitor probare, pecuniam tibi esse numeratam; quo non impleto absolutio sequetur, Cod. 4, 30, 3. 'If you are sued on your stipulation (or written admission) confirmed by a mortgage, the plea of fraud or money not received will force the claimant to prove that the money was lent, or you will be acquitted.' A rescript of Diocletian and Maximian (A.D. 286–305) expressly states that this plea was admissible in an action founded on stipulation. Si stipulatione interposita placita creditor non dederit, in factum esse dandam exceptionem convenit, Cod. 4, 30, 9. 'If, after a stipulation, the contemplated loan was not advanced by the promisee, this fact may be pleaded in an exception.'

It is clear that when these rules were established the nature of verbal and literal contracts was deeply modified: Formal contracts were abolished, so far as the rules extended, or transformed into real contracts, the obligation of the promisor depending on the performance of the promisee (re), that is, on the execution by the promisee of his part of the consideration, not on the solemnity of the spoken words (verbis) or written document (literis).

This transformation of a verbal or literal into a real contract was, however, confined to contracts contemplating a loan of money. Ignorare autem non debes non numeratae pecuniae exceptionem ibi locum habere ubi quasi credita pecunia petitur, Cod. 4, 30, 5. 'The exception of money not received is confined to actions brought to recover money lent.' Moreover, by a constitution of Marcus Aurelius, if the stipulation was accompanied by a written document, the exception could only be pleaded within five years from the date of the contract, which delay was reduced to two years by Justinian, Inst. 3, 21, after which interval the cautio was accepted as incontrovertible proof that the money had been advanced. After this interval, accordingly, Stipulation, armed with a written document, resumed, or rather for the first time assumed, its proper character of a Formal contract.

If no written document accompanied the Stipulation, no length of time barred the defendant from pleading the exceptio Non numeratae pecuniae.

If the plaintiff, instead of suing on the Stipulatio, sued on an alleged loan (Mutuum), the defence of the defendant, though substantially the same, viz. that he had never received the money, being a mere contradiction of the intentio, would not appear in the formula in the shape of an exceptio. (For the circumstances under which a defence took the form of Exceptio, see 4 § 115).

But the usual practice was to associate a Loan with a Stipulatio, and then the lender brought his action not on the Loan but on the Stipulatio. Hence the question of the existence or non-existence of a Loan was usually litigated not in the form of an action brought on a Loan, but in the form of an Exceptio non numeratae pecuniae in an action brought on a Stipulation.

ADSTIPULATIO ET INTERCESSIO.

§ 110. Possumus tamen ad id quod stip*u*lamu*r* alium *ad*hibere qu*i* idem stipul*e*t*u*r, quem vulgo adstipulatorem vocamus.

§ 111. Sed huic proinde actio co*m*petit, proindeque ei recte solvitur ac nobis. sed quidquid consecutus erit, mandati i*u*dicio nobis restituere cogetur.

§ 110. Although another person cannot stipulate for us, yet in our stipulations we can associate with ourselves another person who stipulates for the same performance, and is called an adstipulator.

§ 111. He can sue as well as the stipulator, and payment to him discharges the debtor as well as payment to the stipulator, but whatever he recovers, the action of mandate

compels him to hand over to the stipulator.

§ 112. Ceterum potest etiam aliis verbis uti adstipulator, quam quibus nos usi sumus. itaque si verbi gratia ego ita stipulatus sim: DARI SPONDES? ille sic adstipulari potest: IDEM FIDE TUA PROMITTIS? vel IDEM FIDE IUBES? vel contra.

§ 112. The adstipulator need not employ the same terms as the stipulator; if the one says, 'Art thou sponsor for the conveyance?' the adstipulator may say, 'Dost thou for the same pledge thy credit?' or, 'Dost thou for the same bid me trust thee?' or vice versa.

§ 113. I*tem* m*i*nus adstipulari potest, plus non potest. itaque si ego sestertia X stipulatus sum, ille sestertia V stipulari potest; contra vero plus non potest; item si ego pure stipulatus sim, ille sub condicione stipulari potest; contra vero non potest. non solum autem in quantitate, sed etiam in tempore minus et plus intellegitur: plus est enim statim aliquid dare, minus est post *tempus*.

§ 113. He may contract for less than the stipulator, but not for more. Thus, if I stipulate for ten thousand sesterces he may stipulate for five thousand, or if I stipulate absolutely he may stipulate conditionally, but not vice versa. More and less is to be understood of time as well as of quantity, immediate payment being regarded as more, and future payment as less.

§ 114. In hoc autem iure quaedam singulari iure observantur. nam adstipulatoris heres non habet actionem. item servus adstipulando nihil agit, qui ex ceteris omnibus causis stipulatione domino adquirit. idem de eo qui in mancipio est magis pl*acu*it; nam et is servi loco est. is autem qui in potestate patris est, agit aliquid, sed parenti non adquirit; qu*amv*is ex omnibus ceteris causis stipulando ei adquirat. ac ne ipsi quidem aliter acti*o* co*m*petit, quam si sine capitis diminutione exierit de potestate parentis, veluti morte eius, aut quod ipse flamen Dialis inauguratus est. eadem de filia familias, et quae in manu est, dicta intellegemus.

§ 114. In this institution there are some exceptional rules. The successor of the adstipulator cannot sue; a slave cannot be adstipulator, though in any other circumstance his stipulation acquires a right for his master; a person in domestic bondage cannot be adstipulator, because he is likened to a slave; a son in the power of his father can be adstipulator, but does not acquire a right for his father, as in all other stipulations, and he himself has no right of action until, without loss of status, he ceases to be subject to his father, by his father's death, for instance, or by being inaugurated priest of Jupiter. The same is true of a filiafamilias and a wife in the power of her husband.

§ 115. Pro eo quoque qui promittit solent alii obligari, quorum alios sponsores, alios fidepromissores, alios fideiussores appellamus.

§ 115. For the promisor, similarly, other persons are bound, who are called sponsors or fidepromissors or fidejussors.

§ 116. Sponsor ita interrogatur: IDEM DARI SPONDES? fidepromissor: IDEM FIDEPROMITTIS? fideiussor ita: IDEM FIDE TUA ESSE IUBES?

§ 116. A sponsor is thus interrogated: 'Art thou for the same payment sponsor?' a fidepromissor thus: 'Dost thou for the same pledge

videbimus de his autem, quo nomine possint proprie adpellari, qui ita interrogantur: IDEM DABIS? IDEM PROMITTIS? IDEM FACIES?

§ 117. Sponsores *quidem* et fidepromissores et fideiussores saepe solemus accipere, dum curamus ut diligentius nobis cautum sit. adstipulatorem vero fere tunc solum *ad*hibemus, cum ita stipulamur, ut aliquid post mortem nostram detur: *quod cum* stipulando nihil agimus, *ad*hibetur *ad*stipulator, ut is post mortem nostram agat: qui si quid fuerit consecutus, d*e* *restitue*ndo eo mandati iudicio heredi *nostro* tenetur.

§ 118. Sponsoris *vero* et fidepromissoris similis condicio *est*, fideiussoris v*al*de *d*issimilis.

§ 119. Nam illi quidem nullis obligationibus accedere possunt nisi verborum; quamvis interdum ipse qui promiserit non fuerit obligatus, velut *si femina* aut pupillus sine tutoris auctoritate, aut quilibet pos*t* mortem suam dari promiserit. at illu*d* quaeritur, si ser*vus* aut peregrinus spoponderit, an pro eo sponsor aut fidepromissor obligetur. fideiussor vero omnibus obligationibus, id est sive re sive verbis sive litteris sive consens*u* contractae fuerint oblig*a*tiones, adici potest. a*t* ne illu*d* quidem interest, utrum civilis an naturalis obligatio sit cui adiciatur; adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui a servo fideiussorem accipiat, sive dominus in id quod sibi debeatur.

§ 120. Praeterea sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quaeramus, et alio iure civitas eius

thy credit?' a fidejussor thus: 'Dost thou the same guarantee?' We shall have to consider the question what is the proper name for those who are thus interrogated: 'Wilt thou the same convey? Dost thou the same promise? Wilt thou the same perform?'

§ 117. Sponsors and fidepromissors are often employed for additional security; an adstipulator is only employed to secure payment after our death. Our own stipulation for this is void, and therefore we associate with ourselves an adstipulator, who sues after our death, and is compelled by an action of mandate to hand over to our successor whatever he recovers.

§ 118. The rules which govern the sponsor and fidepromissor are similar, and very unlike those which govern the fidejussor.

§ 119. The former are adjuncts of none but verbal contracts, though (like fidejussions) they are sometimes effective when the principal promisor is not validly bound, as, for instance, when a woman or ward contracts without the guardian's authority, or a person promises a payment after his death. It is a moot question when a slave or alien promises by the term spondeo, whether his sponsor or fidepromissor is effectively bound. A fidejussor may accompany any obligations, whether real, verbal, literal, or consensual, and whether civil or natural. Accordingly, he may be bound for the obligation of a slave either to a stranger or to his master.

§ 120. Again, no successor of the sponsor or fidepromissor is bound, except the successor of an alien fidepromissor in whose municipality

utatur: fideiussoris autem etiam heres tenetur.

§ 121. Item sponsor et fidepromissor *per* legem Furiam biennio liberantur; et quotquot erunt numero eo tempore quo pecunia peti potest, in tot partes deducitur inter eos obligatio, et singuli viriles partes *dare iu*bentur. fideiussore*s* vero perpetuo tenentur; et quotquot erunt numero, singuli in solidum obligantur. *itaque liberum est creditori a quo velit s*olidum petere. *Sed ex epistula divi Hadriani compellitur* creditor a singulis, qui modo solvendo *sint*, *partes petere*. eo igitur distat haec epistula a lege Furia, quod si quis ex sponsoribus aut fidepromissoribus solvendo non sit, *non augetur onus cete*rorum, quotquo*t* erunt. *Cum autem lex Fur*ia *tantum in* Italia locum habeat, *consequens est, ut in provinc*iis sponsores quoque et fidepromissore*s* proinde ac fideiussores in perpetuo teneantur et singuli in solidum obligentur, nisi ex epistula divi Hadriani hi q*uoque* ad*iuvari videantur*.

§ 121. Again, a sponsor and fidepromissor, by the lex Furia, at the end of two years are discharged of obligation, and the total obligation is divided into as many parts as there are sponsors or fidepromissors at the time when the payment is due; and each is only liable for a single part. Fidejussors are liable for ever, and, however many there are, each is liable for the whole amount, and the creditor may sue whichever he chooses for the whole. But by the letter of Hadrian he is compellable to sue only for an aliquot part, determined by the number of the solvent. Herein the letter of Hadrian differs from the lex Furia, for the insolvency of one sponsor or fidepromissor does not increase the liability of the remainder. As the lex Furia only applies to Italy, in the provinces, sponsors and fidepromissors, like fidejussors, are liable for ever, and each would be liable for the whole amount, if they were not held to be relieved by the letter of Hadrian.

§ 122. Praeterea inter sponsores et fidepromissores lex Apuleia quandam societatem introduxit. nam si quis horum plus sua portione solverit, de eo quod amplius dederit *adversus ceteros actionem habet. Lex autem Apuleia ante* legem Furiam lata est, quo tempore in solidum obligabantur: unde quaeritur, an post legem Furiam adhuc legis Apuleiae beneficium supersit. et utique extra *Italiam* superest; nam l*ex* quidem Furia tantum in I*talia* valet, Apuleia vero etiam in *ce*teris *praeter Italiam regionibus. Alia sane est fideiussorum condicio; nam ad hos lex* Apuleia non pertinet. itaque si creditor ab uno totum *con*secutus fuerit, huius solius detrimentum *erit*, sci*licet* si is pro

§ 122. Moreover, between sponsors and fidepromissors the lex Apuleia introduced a sort of partnership, for any one of them who has paid more than his share can recover the excess from the others. The lex Apuleia was passed before the lex Furia, when each sponsor and fidepromissor was liable for the whole amount; and accordingly it is questioned whether, since the lex Furia, the sponsor and fidepromissor still enjoy the benefit of the lex Apuleia. It is undoubtedly available in the provinces, for the lex Furia does not extend beyond Italy; whereas the lex Apuleia extends to the whole empire. A different rule applies to fidejussors, for they do not come within the lex

quo fideiussit solvendo non *sit*. *sed ut ex* supradicti*s* appar*et*, is a quo creditor totum petit, poterit ex epistula divi Hadriani desiderare, ut pro parte in se detur actio.

Apuleia; accordingly, if one fidejussor pay the whole amount, he alone suffers by the insolvency of the principal; but it is his own fault; for, as was said above, a fidejussor sued for the whole amount is entitled by the letter of Hadrian to require the claim to be reduced to his ratable portion.

§ 123. Praeterea lege .... cautum est, ut is qui sponsores aut fidepromissores accipiat praedicat palam et declaret, et de qua re satis accipiat, et quot sponsores aut fidepromissores in eam obligationem accepturus sit: et nisi praedixerit, permittitur sponsoribus et fidepromissoribus intra diem XXX. praeiudicium postulare, quo quaeratur, an ex ea lege praedictum sit; et si iudicatum fuerit praedictum n*on* esse, liberantur. Qua lege fideiussorum menti*o* nulla fit: sed in usu est, etiam si fideiussores accipiamus, praedicere.

§ 123. Further, the lex .... provides that a creditor who obtains the guaranty of sponsors and fidepromissors shall previously announce and declare to them the amount of the debt to be guaranteed and the number of sponsors or fidepromissors by whom it is to be guaranteed; and in the absence of such declaration the sponsors or fidepromissors are permitted within thirty days to demand a trial of the issue, whether the requisite declaration was made; and on judgment that it was not made are discharged of liability. The law makes no mention of fidejussors, but it is usual in a guaranty by fidejussors to make a similar declaration.

§ 124. Sed beneficium legi*s* Corneliae omnibus commune est. qua lege idem pro eodem aput eundem eodem anno vetatur in ampliorem summam obligari creditae pecuniae quam in XX mili*a*; et quamvis sponsor vel fidepromissor in amplam pecuniam, velut si sestertium C milia *se obligaverit, non tamen tenebitur*. Pecuniam autem creditam dicimus non solum eam quam credendi causa damus, se*d* omnem quam tunc, *cum* contrahitur obligatio, certum est debitum iri, id est *quae* sine ulla condicione deducitur in obligationem. itaque et ea pecunia quam in diem certum dari stipulamur eodem numero est, quia certum es*t* eam debitum iri, licet post tempus petatur. Appellatione autem pecuniae omnes res in ea lege significantur. itaque si vinum vel frumentum, et

§ 124. The benefit of the lex Cornelia is available for all sureties, forbidding the same person to be surety for the same debtor to the same creditor in the same year for more than twenty thousand sesterces of ascertained debt; and if a sponsor or fidepromissor guarantees a larger sum, for instance, one hundred thousand sesterces, he can only be condemned in twenty thousand sesterces. Ascertained debt includes, besides a present loan, all money which at the time of suretyship is certain to be due, that is, which depends on no contingency. Accordingly, it includes money stipulated to be paid on a future day; for here the creditor has a vested right to a future payment. Money in this law includes everything, so that, if we stipulate for the conveyance of wine, or corn,

si fundum vel hominem stipulemur, haec lex observanda est.

§ 125. Ex quibusdam tamen causis permittit ea lex in infinitum satis accipere, veluti si do*t*is nomine, vel eius quod ex testamento tibi debeatur, aut iussu iudicis satis accipiatur. et adhuc lege vicesima hereditatium cavetur, ut ad eas satisdationes quae ex ea lege proponuntur lex Cornelia non pertineat.

§ 126. In eo iure quoque iuris par condicio est omnium, sponsorum, fidepromissorum, fideiussorum, quod ita obligari non poss*unt*, *ut* plus debeant quam debet is pro quo obliga*n*tur. at ex diverso ut minus debeant, obligari possunt, sicut in a*d*stipulatoris persona diximus. nam ut astipulatoris, ita et horum obligatio accessio est principalis obligationis, nec plus in accessione esse potest quam in principali re.

§ 127. In eo quoque par omnium causa es*t*, quod si qui pro *r*eo solverit, eius reciperandi causa habet cum eo mandati iudicium. et hoc amplius sponsores ex lege Publilia propriam habent actionem in duplum, quae appellatur depensi.

or land, or a slave, the lex Cornelia applies.

§ 125. In some circumstances, however, the law permits a surety to be bound for an indefinite amount, as security for dower, for instance, or for a legacy, or by judicial order. Also the lex Julia imposing a duty of one twentieth on testamentary successions provides that the securities therein required shall be excepted from the scope of the lex Cornelia.

§ 126. The rights of sponsors, fidepromissors, and fidejussors are also equal in respect of the rule that they cannot be bound for more than their principal. They may, however, be bound for less, just as the adstipulator may stipulate for less. For their obligation, like that of the adstipulator, is an accessory of the principal obligation, and the accessory cannot be greater than the principal.

§ 127. They further resemble in this, that whoever pays for the principal can recover the amount from him by action of mandate. Sponsors by the lex Publilia have an additional remedy, being able, unless reimbursed in six months, to recover twice the sum advanced by the action on money paid by a sponsor.

§ 110. At the corresponding point of his Institutes Justinian introduces the mention of CORREALITY (duo rei debendi, duo rei credendi) and it may be expedient to examine the nature of Correality before we embark on the consideration of the various forms of Guaranty.

Correality, the multiplication of the creditors (plures rei credendi) or debtors (plures rei debendi) in a single obligation without a corresponding division of the Object of the right or obligation, was an institution of Roman law in favour of creditors; whereby, exceptionally and usually in virtue of a special agreement, each creditor was severally entitled to recover the whole (solidum)

object of the obligation from a common debtor, or each debtor was severally liable to pay the whole object of the obligation to a common creditor. The ordinary rule, to which Correality forms an exception, is that when there are many creditors or many debtors in an obligation, the Object of the obligation is correspondingly divided; so that each creditor is only entitled to recover a proportional fraction of the advantage and each debtor is only bound to bear a proportional fraction of the burden. In Correality each creditor is *severally* entitled to receive, and each debtor is *severally* bound to discharge, the whole Object of the obligation. By the ordinary rule, the creditors would be only *jointly* entitled to receive the whole object; and this the debtors would be only *jointly* bound to discharge; each creditor would be *severally* entitled to receive only a ratable part of the Object of the obligation, and a ratable part of the Object is all that each debtor would be *severally* bound to discharge.

Correality may originate in various modes:

(*a*) Contract, whether Formal or Formless, Dig. 45, 2, 9, in which there are several promisors or several promisees. The usual origin of Correality was Verbal contract or Stipulation.

(*b*) Testament: e.g. when a testator charges several successors alternatively with the payment of a legacy.

(*c*) Co-ownership: e.g. when the co-proprietors of a slave are liable for a noxal action for some mischief that he has committed.

(*d*) Potestas patria, or dominica, or Mandatum, when the superior (father or master or principal) is liable to an actio adjectitiae qualitatis (actio de peculio, de in rem verso, quod jussu, institoria, exercitoria, 4 § 69) for the debt of the inferior (son, or slave, or agent). There is Correality between the inferior and superior, and the creditor can elect which he will sue. The Correality of the inferior and superior is here symbolized in the intentio or declaration of the plaintiff, which is identical in form whether the suit is brought against the inferior or the superior.

Correality not only as denoting total or integral liability on the part of the debtor, and total or integral claim on the part of the creditor, furnishes a contrast to partial or fractional (in partem, pro rata) liability or claim; but must also be distinguished from another relation of co-debtors and co-creditors to which it is much more nearly akin, namely SOLIDARITY. Correality and Solidarity agree in this, that in both of them every creditor is severally entitled to receive the whole object of the active obligation, and every debtor

is bound to discharge the whole object of the passive obligation: but differ in this, that whereas Correality implies the unity or identity of the obligation by which the co-creditors are entitled or the co-debtors are bound; Solidarity implies that they are entitled or bound by a plurality or diversity of obligations.

Solidarity originates in various modes:

(*a*) Common delict, when several co-delinquents incur a liability to indemnification.

(*b*) Co-guardianship, when one of the co-guardians has injured the ward from negligence.

(*c*) Contract in which there are several promisors but no pactum adjectum to create Correality; e.g. where there are several borrowers, hirers, agents, depositaries.

(*d*) Guaranty by the form of mandate called Mandatum qualificatum; or by the form of Constitutum called Constitutum debiti alieni.

Both Correality and Solidarity, as implying an integral but alternative obligation, lie in the mean between two extremes: on the one side, divided or partial (pro rata) liability; and on the other side, the multiple or cumulative liability, generated by delicts that give rise to bilaterally penal suits (4 § 6). E.g. if several persons combine to commit a theft they are all severally debtors for the whole penalty, and payment by one does not discharge his fellows: or if a person is guilty of an outrage (injuria) which wounds the honour of several, they are all creditors for the penalty, and recovery by one does not extinguish the claims of the rest, 3 § 221. Where the actions on delict are purely indemnificatory, or only unilaterally penal, as the actions brought on Metus, Dolus, Noxa, Vis, there, as we have already stated, the relation of Solidarity subsists between the co-delinquents, and satisfaction by one extinguishes the obligation of the rest.

The differences between Correality and Solidarity are principally two:

1. In Correality the right of action against the remaining co-debtors or by the remaining co-creditors was extinguished by the institution of a suit (litis contestatio) against or by one, whatever the result of the suit: in Solidarity the right of action was only extinguished by complete payment or satisfaction (solutio). Electo reo principali fidejussor vel heres ejus liberatur: non idem in mandatoribus observatur, Paulus 2, 17, 16. 'Election to sue the

principal debtor discharges a Correal surety or his heir, but not a solidary surety.' Plures ejusdem pecuniae mandatores, si unus judicio eligatur, absolutione quoque secuta non liberantur, sed omnes liberantur pecunia soluta, Dig. 46, 1, 25, 3. 'Where there are several solidary sureties of the same debt, and one is sued, the remainder are not discharged of liability by his acquittal, but are discharged by his satisfaction of the debt.'

It was possible to avoid the consumption or extinction of the right of action against the surety that was operated by suing the principal by so shaping the formula of fidejussio as not to produce Correality, Dig. 45, 1, 116. But at a later period the whole principle of process-consumption (extinction of right to sue by litis contestatio) was tacitly abandoned: and Justinian expressly enacted that in Correality as well as in Solidarity only actual satisfaction of a claim should operate a consumption of the right of action. Generaliter sancimus, quemadmodum in mandatoribus statutum est, ut contestatione contra unum ex his facta alter non liberetur, ita et in fidejussoribus observari. Et ideo generali lege sancimus nullo modo electione unius ex fidejussoribus vel ipsius rei alterum liberari, vel ipsum reum fidejussoribus vel uno ex his electo liberationem mereri, sed manere jus integrum donec in solidum ei pecuniae persolvantur vel alio modo satis ei fiat. Idemque in duobus reis promittendi constituimus, Cod. 8, 41, 28. 'We ordain that as in guaranty by mandate joinder in issue against one guarantor does not discharge another, the same rule be observed in guaranty by stipulation . . . and that election to sue one fidejussor or the principal shall not discharge another fidejussor, nor shall election to sue the fidejussors or one of them discharge the principal, unless satisfaction be made to the creditor, whose rights shall remain intact until he has received complete payment or other satisfaction; and the same rule shall be observed wherever there is Correality between promisors.' Justinian's ordinance is introduced into the Digest by means of a bold interpolation: Cum utro velit Seius aget, ut, si cum uno actum sit *et solutum*, alter liberetur. Pomponius, Dig. 30, 1, 8, 1.

2. A second difference between Correality and Solidarity consists in the fact that in Solidarity the guarantor who pays the whole has regressus against his co-guarantors, that is to say, has a power of recovering from them contribution of their share of the debt: whereas the Correal debtor who pays has no regressus or right to contribution. (I have here followed Vangerow: Savigny attempts

to prove, but apparently without success, that regressus is an incident of Correality.) Where, however, the Solidarity is the effect of co-delinquency (No. *a*. above) the delinquent who pays has no regressus.

After this preliminary consideration of the nature of Correality we are in a position to examine the nature of Guaranty or Suretyship, and to fix the relation of fidejussio, one of the latest developments of Suretyship, to other cognate institutions of Roman jurisprudence.

Fidejussio is a species of INTERCESSIO; and accordingly the above mentioned object requires us to examine the nature and subdivisions of Intercessio.

Intercession is the assumption of liability for the debt of another person by negotiation or contract with his creditor. For instance, when a person is hesitating whether he shall accept a succession because he has doubts whether it is solvent, that is, whether the assets exceed the liabilities, to induce him to accept it by a promise of indemnification, is not intercession, because here there is no contract with a creditor: but if the ground of his hesitation is a suspicion that the debtors to the inheritance are insolvent, to induce him to accept the inheritance by a promise to make good what he fails to recover from the debtors is Intercession, for here is a contract with a creditor.

Intercession is either (A) Privative or (B) Cumulative.

A. Privative Intercession is the substitution of one obligation for another.

(1) Substitution for an actually pre-existent debt involves NOVATION, i.e. the extinction of such preceding debt, and is called EXPROMISSIO. Expromission, the discharge of a debtor by taking his place in relation to the creditor, may be considered as including Defensio, the defence of an absent debtor in a suit instituted by the creditor; for then the volunteer defendant became liable to condemnation in place of the original debtor: Suscipit enim in se alienam obligationem, quippe quum ex hac re subeat condemnationem, Dig. 16, 1, 2. As the act of the former debtor, this substitution is called DELEGATIO, or, divested of its stipulatory form, ASSIGNATIO. Expromissio, then, and Delegatio are the same disposition viewed from different sides.

(2) Substitution, not for an actually pre-existent obligation which is novated, but for an obligation which would have to be incurred by another person if the present obligation were not

assumed, is called INTERVENTIO. Si quum essem tecum contracturus, mulier intervenerit ut cum ipsa potius contraham, videtur intercessisse, Dig. 16, 1, 8, 14.

B. Cumulative Intercession, or the addition of an obligation to an obligation, is either Partial or Total, according as either part or the whole of the object of the first obligation is the object of the second or additional obligation.

(3) Of Partial intercessors we find an example within the limits of Italy, in SPONSORS and Fidepromissors under the operation of the lex Furia. By this law the liability of each sponsor was in inverse ratio to their number, § 121. Whether an Italian Sponsor who had not availed himself of the limitation of his liability under the lex Furia was entitled to Regressus under the older lex Apuleia, was a matter of controversy, ibid.

Total Intercession is divided, according as several debtors are bound by one single obligation or several distinct, though similar, obligations, into two classes, Correality and Solidarity.

Correality is subdivided into two classes, according as all the debtors are equally principals and originally interested, or some are principal and others only subsidiary or accessory.

Correality in which all the debtors are interested as principals has no specific name, but bears in a distinctive meaning the generic name of CORREALITY. As Intercession has been defined to be the assumption of an alien debt (aliena obligatio), this Correality is not a species of Intercession.

(4) Correality in which one debtor is principal and others are accessory is instanced in FIDEJUSSIO. There is not only Correality between the principal and each Fidejussor but also between the several Fidejussors. This is denied by Savigny, Law of Obligations, § 25, who asserts that though there is Correality between the principal and each Fidejussor there is none between the several Fidejussors: but Vangerow truly observes, § 578, that if the obligation of each Fidejussor is identical with the obligation of the principal it follows, by the fundamental axiom of syllogism, that the obligations of the several Fidejussors are identical with one another: in other words, that there is Correality between the several Fidejussors. Fidejussors have Beneficium divisionis by the epistle of Hadrian, § 121, Beneficium excussionis by Novella 4 of Justinian, and emptio nominis or Beneficium cedendarum actionum. If he neglected to avail himself of these, a Fidejussor, like other

correal debtors, had no regressus against his co-fidejussors, Dig. 46, 1, 39.

Correality is again instanced in the sponsors and Fidepromissors of the provinces external to Italy under the operation of the lex Apuleia. Unlike other correal debtors they had by this statute Regressus by means of the action pro Socio, § 122; though like Fidejussors, they also had Beneficium divisionis under the constitution of Hadrian, § 121.

5. Solidary Intercession is exemplified by the Mandator in the contract called MANDATUM QUALIFICATUM. Here a lender gives credit to a borrower in reliance on the representations of the mandator, § 156, who thus is a guarantor of the borrower's solvency: when there are several such guarantors, their liability is solidary.

6. Other Solidary Intercessors are the Constituentes in CONSTITUTUM DEBITI ALIENI. Both the Mandator and the Constituens have Beneficium divisionis, Cod. 4, 18, 3, and Beneficium excussionis, Novella 4.

§ 114. The peculiarity of the rules respecting the adstipulator arise from the fact that he was a mandatary, agent, or trustee, the repositary of a special personal confidence. Hence his rights did not pass to his heres nor to his paterfamilias. Ordinary rules, however, obtained so far, that he could not sue so long as he remained a filiusfamilias, nor after his rights had been extinguished by a capitis diminutio.

The principal function of the Adstipulator and one function of the Adpromissor (the chief function of the latter of course was suretyship) seems to have been processual agency, i. e. the representation of the principal as plaintiff or defendant in a suit at a period when the doctrine of Agency was still undeveloped.

We must suppose a time when the Cognitor and Procurator, whose appointment as described, 4 § 83, was such a simple matter, were institutions not yet invented: a period like that of Statute-process (legis actio), concerning which we are told: Nemo alieno nomine lege agere potest, Dig. 50, 17, 123, 'only principals could be parties to a suit;' and when, nevertheless, circumstances often prevented a principal from litigating in person. In questions of Property he might get over the difficulty and practically employ an agent by fiduciary mancipation, Dig. 4, 7, 4, 3, of the property in dispute to a third person, who would then litigate with the adversary in the rights of his auctor, or the person from whom he

deduced his title. But in questions of Obligation this course was not open, for Obligation was not thus transferable. Novation or Delegation might effect the purpose, 2 § 38, 3 § 176: but Delegation required the concurrence of the debtor or adversary: and Cession or Procuration, 2 § 39, we have assumed to be as yet uninvented. At this period, then, the only remaining available representative in a suit concerning contractual obligation was a person who had been concerned, though merely as an accessory, § 126, in the original convention. Ihering, § 56. When the development of the law of mandate led to the frequent appointment of a procurator, the adstipulator ceased to be necessary except for securing performance of an act after the death of the principal promisee, § 117. He ceased to be necessary even for this purpose when a stipulation for an act after the death of the stipulant was decided to be valid, and accordingly the adstipulator has disappeared from the legislation of Justinian.

§ 115. The adpromissor at different epochs of the law appears as sponsor, fidepromissor, fidejussor. A sponsor could only intervene when both parties were Roman citizens, a fidepromissor was used when either party was a peregrinus, § 120. There is a striking parallelism between the rules relating to a sponsor or fidepromissor and those relating to an adstipulator. The obligation does not pass to the heres, and the stipulation of the sponsor or fidepromissor may be valid when that of the principal, though valid by Jus gentium, is by Civil law invalid; for instance, for a performance after the death of the principal promisee. The sponsor and fidepromissor can only be adjuncts to a stipulation, the fidejussor may be employed to guaranty any obligation.

§ 121. The lex Furia discharging the sponsor and fidepromissor of liability in two years and limiting the liability of each to a proportionate part, is supposed to have been enacted B.C. 95.

The epistle of Hadrian (A.D. 117–138) left the fidejussor liable originally (ipso jure) to the whole debt, with a counteractive right (exceptio) to reduction, enforced by a clause in the formula, of which the following passage appears to give the terms: Si contendat fidejussor caeteros solvendo esse, etiam exceptionem ei dandam: Si non et illi solvendo sint, Dig. 46, 1, 28. 'The contention of a fidejussor that his co-fidejussors are solvent may be expressed in an exception: Unless such and such co-guarantors are solvent.' This privilege of the fidejussor is called Beneficium divisionis.

§ 122. The lex Apuleia, which gave the sponsor or fidepromissor the action pro socio, whereby he could recover by contribution from his co-guarantors whatever he had paid in excess of his proportionate share, was passed B.C. 102. It was the rule of the provinces as the lex Furia was the rule of Italy.

§ 123. For the illegible name of the law requiring the principal to give information of the amount of the debt and the number of co-sureties various guesses have been made by different critics—Porcia, Petreia, Cornelia, Pompeia, Apuleia.

§ 124. The lex Cornelia, the first which mentions the fidejussor as well as the sponsor and fidepromissor, limiting the amount for which the same guarantor could be bound as security for a contract either of mutuum or of stipulatio in the same year for the same principal to the same guarantee, was passed in the dictatorship of Sylla, B.C. 81, and seems to show that the stringency of the lex Furia had led to a more frequent employment of the fidejussor in place of the sponsor and fidepromissor. The sponsor and fidepromissor have vanished from the legislation of Justinian.

§ 125. Perhaps for vicesima we should read vicesimaria or vicesimae. The lex Julia vicesimaria was a law of Augustus, imposing, in support of the military treasury, a succession duty of one twentieth of the value on the testamentary succession of all cives Romani.

§ 127. The lex Publilia, which enabled a sponsor who had paid the debt of his principal, unless reimbursed within six months, to recover by actio depensi, a form of manus injectio pro judicato (Gaius, 4 § 22), twice the amount of the original debt, is of uncertain date.

If a fidejussor, instead of claiming the reduction of his liability by division among the co-fidejussors under the epistle of Hadrian, was prepared to pay the whole debt, he could require the creditor to cede to him his actions against the principal debtor and the co-fidejussors, and then paying the creditor, not as surety (for then the debt and right of action would be extinguished), but as purchaser of the debt, he could be appointed procurator of the creditor (receive a power of attorney), and would be able to sue in the name of the creditor for his own benefit. Fidejussoribus succurri solet, ut stipulator compellatur ei qui solidum solvere paratus est, vendere ceterorum nomina, Dig. 46, 1, 17. 'Guarantors are relieved by the guarantee being compelled, if one is ready to pay the whole, to sell him the debt of the others.' Cum quis, et reum et fide-

jussores habens, ab uno ex fidejussoribus accepta pecunia, praestat actiones, poterit quidem dici nullas jam esse, quum suum perceperit et perceptione omnes liberati sint; sed non ita est; non enim in solutum accepit, sed quodammodo nomen debitoris vendidit, et ideo habet actiones, quia tenetur ad id ipsum ut praestet actiones, Dig. 46, 1, 36. 'When a creditor secured by guarantors receives the whole sum from one and cedes him his rights of action, it may be argued that the rights are extinguished because the claim of the creditor is satisfied and the satisfaction discharges the debtor and co-guarantors: but it is not so; for it is not in satisfaction but in purchase of the debt that the payment is made, and therefore the creditor retains the right of action and is bound to let the purchaser sue in his name.' This passage of Paulus has doubtless been altered to make it harmonize with the legislation of Justinian: for in the time of Paulus not only satisfaction of the debt (Solutio) but institution of a suit (litis contestatio) extinguished the creditor's right of action and enabled the fidejussors to defend themselves by the Exceptio rei in judicium deductae.

This power of litis contestatio to extinguish the creditor's right of action when there was a relation of Correality between a number of debtors was doubtless a powerful motive towards substituting for Fidejussio other forms of guaranty involving Solidarity instead of Correality, and consequently free from process-consumption or extinction of right of action by mere litis contestatio. Such forms were Mandatum qualificatum and Constitutum debiti alieni. At a later period process-consumption became obsolete and in respect of Fidejussio was expressly abrogated by Justinian, Cod. 8, 41, 28.

The right of a fidejussor to have a cession from the creditor of his rights of action is called Beneficium cedendarum actionum. If he neglected to avail himself of it and of his Beneficium divisionis, he had no Regressus against his co-sureties, Dig. 46, 1, 39.

By the English law, if there be several co-guarantors, and one of them on the default of the principal pay the whole debt or more than his proportion of it, he may claim contribution against his co-guarantors, and recover for such excess above his proper share. But if there be three sureties, and one of them be insolvent, and a second pay the whole debt, at law he can only recover from the third his proportional share, that is, one third of the debt; but in equity he would recover one moiety. The English surety, then, differs from the fidejussor who had no Regressus.

The surety or guarantor, after payment of the debt, had formerly no right to insist that the debt or instrument by which the debt was evidenced should be assigned to him; for such assignment was held to be utterly useless, inasmuch as the debt was extinguished, and the instrument was worthless as an evidence of debt because proof of payment would be a conclusive answer to any claim depending thereupon. (The emptio nominis conceded to the Roman surety was not recognized.) Co-guarantors, however, were entitled in equity to all collateral securities which the guarantee or creditor might have taken. But by a recent enactment every surety who pays a debt is entitled to stand in the place of the creditor, and to have all the creditor's securities assigned to him; and no action upon them against the debtor or co-sureties can be barred by plea of payment by the surety. In the present state of the law, then, a surety always has the benefit which the fidejussor might obtain by Emptio nominis.

A surety or guarantor of a debt may require the creditor to proceed against the principal first, provided he offer to indemnify him in such proceedings, and to pay any deficiency in the sum which he may recover. This is called Beneficium excussionis, and was introduced by Justinian, Novella 4.

The most noticeable rule of English law respecting the contract of guaranty is that it must be in writing. No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized, Statute of Frauds, 29 Charles II.

The general name of a stipulation by way of security for a debt is cautio. If the debtor alone was bound, it was called nuda repromissio. If sureties were also bound, it was called satisdatio or satisacceptio.

Before quitting the subject of suretyship we must observe a peculiar feature of Roman law, the incapacity of women to play the part of guarantors. This was enacted by the senatusconsultum Velleianum passed in the reign of Claudius, A.D. 46: Cujus senatusconsulti verba haec sunt: Quod Marcus Silanus et Velleius Tutor, consules, verba fecerunt de obligationibus feminarum quae pro aliis reae fierent, quid de ea re fieri oporteret, de ea re ita consuluerunt:

Quod ad fidejussiones et mutui dationes pro aliis pro quibus intercesserint feminae pertinet, tametsi ante videtur ita jus dictum esse, ne eo nomine ab his petitio neve in eas actio detur, quum eas virilibus officiis fungi et ejus generis obligationibus obstringi non sit aequum: arbitrari senatum, recte atque ordine facturos ad quos de ea re in jure aditum erit, si dederint operam ut in ea re senatus voluntas servetur, Dig. 16, 1, 2. 'On the question of the consuls Marcus Silanus and Velleius Tutor, how the liabilities of women who undertake to be responsible for the debts of others should be dealt with by the tribunals, it was resolved that guaranties and interventions of women (loans to women instead of to others whose liabilities are thus assumed by women), though formerly held to be valid, shall not henceforth be valid to support any actions or suits against female intercessors, as manly functions and liabilities are not fairly chargeable on women, [and] the senate deem it incumbent on the judicature to see that their will in this matter is enforced.' INTERVENTION, as was explained above, is a form of Privative Intercession; whereby a woman does not, like an Expromissor, discharge a pre-existing obligation, but incurs an original obligation which would otherwise have been incumbent on another person. Cod. 4, 29, 4, ibid. 19.

Though the senatusconsultum seems to say that no action shall be brought against a female guarantor, yet the frequent occurrence of the phrase, exceptio senatusconsulti Velleiani, shows that an action might be brought, but was barrable by an exception pleading the senatusconsult.

DE LITTERARUM OBLIGATIONE.

§ 128. Litteris obligatio fit veluti in *nominibus* transcripticiis. fit *autem* nomen transcripticium duplici modo, vel a re in personam, vel a persona in person*am*.

§ 128. Literal contracts, or obligations created by writing, are exemplified by transcriptive entries of debit or credit in a journal. Transcriptive entries are of two kinds, either from thing to person or from person to person.

§ 129. *A re in personam transcriptio* fit, veluti si id quod *tu* ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero.

§ 129. Transcription from thing to person is exemplified when the sum which you owe me on a contract of sale or letting or partnership is debited to you in my journal as if you had received it as a loan.

§ 130. A persona in person*am* transcriptio fit, veluti si id quod mihi Titius debet tibi id expensum

§ 130. Of transcription from person to person we have an example when the sum which Titius

tulero, id est si Titius te delegaverit mihi.

owes me is entered in my journal as advanced to you, assuming that you are indebted to Titius and that Titius has substituted me for himself as your creditor.

§ 131. Alia causa est eorum nominum quae arcaria vocantur. in his enim *rei*, non litterarum obligatio consistit: quippe non aliter val*ent*, quam si numerata sit pecunia; numeratio autem pecuniae rei, non *litterarum* facit obligationem. qua de causa recte dicemus arcaria nomina nullam facere obligationem, sed obligationis factae testimonium praebere.

§ 131. Transcriptive entries differ from mere entries of a person as debtor to cash; here the obligation is not Literal but Real, for money must have been actually paid, and payment of money constitutes a Real not a Literal obligation. Consequently the entry of a person as debtor to cash does not constitute an obligation, but is evidence of an obligation.

§ 132. Unde proprie dicitur arcariis nominibus etiam peregrinos obligari, quia non ips*o* nomine, sed n*u*meratione pecuniae obligantur: quod genus obligationis iuris gentium est.

§ 132. Accordingly, debits to cash bind aliens as well as citizens, because it is not the entry in the journal but the payment of money that constitutes the contract, and this mode of obligation is common to all the world.

§ 133. tr*an*scripticiis vero nominibus an obligentur peregrini, merito quaeritur, quia quodammodo iuris civilis est talis obligatio: quod Nervae placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transcripticium, etiam peregrinos obligari: si vero a persona in personam, non obligari.

§ 133. Whether transcriptive debits form a contract binding on aliens has been doubted with some reason, for this contract is an institution of civil law, as Nerva held. Sabinus and Cassius, however, held that transcription from thing to person forms a contract binding on an alien, though not transcription from person to person.

§ 134. Praeterea litterarum obligatio fieri videtur chirografis et syngrafis, id est si quis debere se aut daturum se scribat; ita scilicet, si eo nomine stipulatio non fiat. quod genus obligationis proprium peregrinorum est.

§ 134. Another Literal obligation is that created by chirographa and syngraphae, or written acknowledgments of debt or promises to pay, unaccompanied by stipulation. This mode of contract is proper to aliens.

One of the account books kept by the Romans, a nation of bookkeepers, was a waste or day book, called Adversaria, into which all transactions were entered as they occurred. At the end of each month the contents of the Adversaria were posted into the more formal journal, the Tabulae, or Codex accepti et expensi. One page of this, as appears from Pliny, was devoted to the incomings, the other to the outgoings. Huic (Fortunae) omnia expensa, huic omnia feruntur accepta, et in tota ratione mortalium sola utramque

paginam facit, Hist. Nat. 2, 7. 'Fortune is debited with everything and credited with everything, and, in the book-keeping of mortals, Fortune alone occupies both the pages.' According to Dionysius of Halicarnassus every Roman had to take an oath once in five years before the Censors that his book-keeping was honest and accurate.

One species of Literal obligation, namely Expensilation, in the nature of a novation or transformation of a pre-existing debt into one of a stricter form, was effected by an entry in these domestic registers, and from Cicero, Pro Roscio Comoedo, we may infer that the entry was binding even though it had not been transferred from the Adversaria to the Codex. The creditor, apparently, with the consent and by the order of the debtor, debited the latter with a certain sum in the books of the creditor (expensilatio). Afterwards a corresponding entry was made by the debtor in the books of the debtor (acceptilatio). The literal contract, however, appears to have been complete without the latter entry.

The lender dictated to the borrower the entry to be made in the books of the borrower.

> Scribe decem a Nerio. Non est satis. Adde Cicutae
> Nodosi tabulas centum: mille adde catenas:
> Effugiet tamen haec sceleratus vincula Proteus.
> . . . Putidius multo cerebrum est, mihi crede Perilli
> Dictantis quod tu nunquam rescribere possis.—Horace.

'Enter ten sestertia to the credit of Nerius. 'Tis not enough. Add covenants of Cicuta the knot-tier on a hundred pages; add a thousand chains: yet the wily Proteus will escape these bonds. . . . Greater far is the madness of Perillius [Nerius] to dictate credits which your debits can never balance.' [Perhaps the true lender is Perillius, and Nerius and Cicuta are only two bankers in whose books the same debt is contemporaneously recorded. For this practice, see Dig. 2, 14, 9, as presently quoted.]

Apparently, the true contract was the entry in the creditor's book. The consent (jussus) of the debtor to this entry was necessary, but not restricted to any particular form. The entry in the debtor's book was evidence, but not the only admissible evidence, that he had assented to the entry in the creditor's book.

Theophilus, in his Greek version of the Institutes, gives the following account of the process: ἡ δὲ literis [ἐνοχὴ] ἐστὶ τὸ παλαιὸν

χρέος εἰς καινὸν δάνειον μετασχηματιζόμενον ῥήμασι καὶ γράμμασι τυπικοῖς. . . . ἦν δὲ ταῦτα τὰ ῥήματα, ἅτινα καὶ ἐλέγετο καὶ ἐγράφετο· τοὺς ἑκατὸν χρυσοῦς, οὓς ἐμοὶ ἐξ αἰτίας μισθώσεως χρεωστεῖς, σὺ ἐκ συνθήκης καὶ ὁμολογίας δώσεις τῶν οἰκείων γραμμάτων; εἶτα ἐνεγράφετο, ὡς ἀπὸ τοῦ ἐνόχου ἤδη γενομένου ἐκ τῆς μισθώσεως, ταῦτα τὰ ῥήματα· Ἐκ τῆς συνθήκης ὀφείλω τῶν οἰκείων γραμμάτων. Καὶ ἡ μὲν προτέρα ἐνοχὴ ἀπεσβέννυτο, καινοτέρα δὲ ἐτίκτετο, Theophilus, 3, 21. 'A literal obligation was an old debt transformed into a new loan by certain solemn words and writings. The words which were spoken and written in the register were as follows: "The hundred aurei which you owe me on account of rent will you pay me on the convention and acknowledgment of your own journal?" Then followed, as if written by the person indebted for rent, these words: "I owe you that sum by the admission of my own journal." Whereby the pre-existing obligation was extinguished and a new one created.' [From the mention of 'solemn words' Theophilus is supposed to have confounded Expensilatio, which was independent of spoken words, with Stipulatio accompanied by a written record or CAUTIO.]

The account of Theophilus clearly only applies to one form of expensilation, the transcriptio a re in personam. The use of this kind of transcriptio is obvious: it was a mode of converting Formless contracts into Formal contracts—equitable obligations into civil obligations: of metamorphosing claims recoverable by actions ex bona fide, e.g. conducti locati, empti venditi, which in many points favoured the defendant, into debts recoverable by the short and sharp remedy of the civil action of Condictio, which, when brought for certa pecunia credita, was the more formidable to a dishonest litigant, as it was accompanied by sponsio poenalis, whereby the vanquished party forfeited a third of the sum in litigation, in addition, if he was the defendant, to the original claim, 4 § 171.

A narrative of Cicero shows the employment and possible misemployment of this transcriptio. He relates how a purchaser was defrauded by a vendor, and in consequence of the form of contract had no redress. Stomachari Canius. Sed quid faceret? Nondum enim Aquilius collega et familiaris meus protulerat de dolo malo formulas, De Off. 3, 14. 'The purchaser was indignant, but he was helpless, for my colleague Aquilius had not then invented the action of Fraud.' It may occur to us, on hearing the story, that as the actio Empti was an action ex bona fide, that is, one in which

the judex was empowered to consider allegations of bad faith, the defrauded purchaser would not have been without a remedy. But, as Savigny points out, Cicero had guarded against this objection by a certain feature which he gives to the narrative. Emit homo cupidus et locuples tanti quanti Pythius voluit, et emit instructos. *Nomina facit,* negotium conficit. 'The purchaser was eager and rich, he bought at the price the seller named, and he bought the gardens ready furnished. The contract is by expensilatio; the business is concluded.' Nomen, which sometimes signifies any debt, is here used, in a specific sense, for a debt created by Literal contract; accordingly, nomina facit implies that the purchase, as soon as concluded, had been novated, § 176, i. e. extinguished by metamorphosis into a ledger debt; so that the transaction was removed from the domain of equity to that of civil law, which in its primitive simplicity had no provision for dolus malus.

Transcription a persona in personam was the substitution or exchange of a debt owed by C to B, in discharge of a debt owed by B to A; or, at all events, the substitution of C in lieu of B as debtor to A. It is impossible to form an exact conception of the mode in which these transcriptions were operated without a greater knowledge than we possess of the Roman method of book-keeping. Nomen facere, as we have just stated, is to contract a debt by literal obligation. Nomen signifies the name of the debtor, as in the line of Horace: Scriptos nominibus certis expendere nummos; 'Recorded on his ledger to lend moneys to solvent borrowers;' and in the following passage of the Digest: Si plures sint rei stipulandi, vel plures argentarii, quorum nomina simul facta sunt, unius loco numerabuntur, quia unum debitum est, Dig. 2, 14, 9. 'Several joint promisees in a stipulation, or several bankers in whose respective books the same debtor is contemporaneously debited with the same sum, count as one creditor in insolvency, because there is but one debt.' In the business of bankers (argentarii), whose book-keeping of course was extremely regular, the Literal contract appears to have survived when it had fallen into desuetude in other quarters.

The word Transcriptitia may refer to the *transfer* involved in Novation: Savigny however prefers the following origin of the term. The Roman account-book (tabulae accepti et expensi), he supposes, was essentially a Cash-book: a record of incomings and outgoings of actual cash: i. e. the monthly or annual balance of

the debits and credits ought to correspond with and explain the metallic contents of the cash-box or arca at the end of the month or year. This correspondence or agreement would be destroyed by the introduction of Fictitious loans (expensilatio) into the accounts, unless every such entry to the credit of the cashier or chest was neutralized and cancelled by a *cross* or opposite entry, of an equally fictitious character, to the debit of the chest or cashier. But if this device was adopted the balance of the book would coincide with the actual contents of the chest; and the fictitious entries would be called Transcriptitia because they were always double: because each was always accompanied by its shadow *across* the page.

In the time of Justinian both of the modes of Expensilatio, properly confined to Roman citizens, had become obsolete; but another form of Literal contract, the Syngrapha or Chirographum, available where either of the parties was an alien, was still in use. Syngrapha and Chirographum, apparently, are synonymous, and signify any contract in writing, such contract in Greece being always ground to support an action, whatever its subject or form.

The desuetude of Nomina transcriptitia was probably due to the invention of CONSTITUTUM, a Consensual contract, which instead of converting like Expensilatio an equitable obligation into an obligation of jus strictum, superadded a civil obligation to a previous obligation, whether equitable or civil [Ubi quis pro alio constituit se soluturum, adhuc is pro quo constituit obligatus manet, Dig. 13, 5, 28]; and which with its excessively penal sponsio, 4 § 171, gave the creditor even a more effective remedy than the action on Expensilatio (Condictio for pecunia certa credita).

Arcarium nomen was the record, not of a fictitious loan, like nomen transcripticium, but of the counting out of money from the cash-box (arca), that is, of a genuine loan, and was, accordingly, a memorandum of a Real obligation.

The coexistence of Nomina Arcaria with Nomina Transcriptitia shows that entry in a Ledger did not operate a novation and convert a debt into a ledger debt, unless such effect was intended.

A stipulatio, unlike the entry in the journal or ledger, was not an invariable accompaniment of an advance of money (mutui datio, annumeratio); and, when it was employed simultaneously with annumeratio, unlike expensilatio, it always constituted the sole contract: there were not two contracts, a Real contract and a Verbal

contract, but only a Verbal contract, and this without the intervention of Novation, Dig. 46, 2, 6, 1, and Dig. 46, 2, 7. Nam quoties, pecuniam mutuam dantes, eandem stipulamur, non duae obligationes nascuntur sed una verborum, Dig. 45, 126, 2. 'An advance accompanied by Stipulation does not produce two contracts, but one, a Verbal contract.'

Savigny's doctrine that personal execution (incarceration) of a judgment debtor (judicatus) was confined to actions brought on loans of money (annumeratio) accounts satisfactorily for a debt being sometimes left in its original form of a Real contract (mutuum), sometimes being converted into a Verbal contract (stipulatio), or Literal contract (expensilatio). When the interest of the borrower prevailed, the contract would take the form of stipulatio or expensilatio, with a milder remedy; when the interest of the lender predominated, the contract would retain the form of mutui datio, with its more stringent execution.

The exceptio doli mali or pecuniae non numeratae, throwing the burden of proof on the promisee, as we have stated in respect of verbal contracts, would have destroyed the effect of literal contracts, supposing that any such existed, for the five years or two years during which the exceptio could be pleaded. The promisee fulfilled his duty of Proof if he produced a written acknowledgment by the promisor of the particular debt that preceded the promise to pay (cautio discreta). Sin autem cautio indebite exposita esse dicatur, et indiscrete loquatur, tunc eum in quem cautio exposita est compelli debitum esse ostendere quod in cautionem deduxit; nisi ipse specialiter qui cautionem exposuit causas explanavit pro quibus eandem conscripsit. Tunc enim stare eum oportet suae confessioni, nisi evidentissimis probationibus in scriptis habitis ostendere paratus sit, sese haec indebite promisisse, Dig. 22, 3, 25, 4. 'When a written acknowledgment of debt is alleged to be without consideration, if it does not specify the origin of the debt, the burden of proof is on the promisee; but if it specify the cause of debt, the promisor must stand by his admission, unless he has the clearest documentary evidence to prove the failure of consideration.'

Cautio in Justinian's legislation still, as originally, merely signified a probative or evidentiary document, as opposed to a literal contract, and denoted the written memorandum which usually accompanied every contract, whether real, verbal, or consensual. It is often named, for instance, in connection with deposit, sale,

stipulation, and other contracts. It is true that in the Code and Digest we often also find it apparently equivalent to chirographum or some other kind of literal contract, binding simply by its form; e.g. Si quasi accepturi mutuam pecuniam adversario cavistis quae numerata non est, per condictionem obligationem repetere, etsi actor non petat, vel exceptione non numeratae pecuniae adversus agentem uti potestis, Cod. 4, 30, 7. 'If you gave your adversary an acknowledgment of debt in contemplation of a loan which was not advanced, you may force him by action to deliver up the obligation if he delays to sue upon it, or may bar his claim by exception of money not advanced if he sues.' It would be necessary to have the instrument surrendered, because after two years it would be conclusive evidence of debt. But in Justinian's time, with perhaps the exception of Syngrapha, there was no Literal contract. The action in which a plaintiff would gain his cause by production of a Cautio, would be either a condictio MUTUI, i.e. founded not on a Literal or Formal, but on a REAL or Formless obligation (annumeratio); or a condictio certi ex STIPULATIONE, founded on the binding force of WORDS.

It may assist us in understanding the distinction of Formless and Formal contracts, Verbal and Literal, if, before we quit this subject, we cast a hasty glance at the corresponding institutions of English law.

In the eye of the English law, contracts are either Simple (parol), that is, enforceable only on proof of consideration, or Special, that is, binding by the solemnity of their form. Special contracts are either contracts under Seal or contracts of Record. A common species of Deed, or written contract under seal, is the Bond or Obligation, which, like Stipulatio, is used to secure the payment of money or performance of any other act, and, like Stipulatio, either binds the debtor alone or the debtor and sureties. It consists of an obligatory part or penal clause, and a condition added, that if the obligor does some particular act the obligation shall be void, but else shall remain in full force.

Contracts of Record are either recognizances or Judgment debts.

A Recognizance is an acknowledgment before a court or magistrate that a man owes the Queen or a private plaintiff (as the case may be) a certain sum of money, with a condition avoiding the obligation to pay if he shall do some particular act, as, if he shall appear at the assizes, keep the peace, pay a certain debt, or the like.

A Recognizance resembles Stipulation in its form, being entered into by oral interrogation and answer, but differs in that it can only be taken before a court or magistrate duly authorized, whereas stipulatio was transacted between private parties.

A Judgment debt, or debt due by the judgment of a court of record, is sometimes the result of a judgment in an adverse suit, but sometimes it is merely a form of written contract, and may be entered into in various ways. A fictitious action is brought, and the party to be bound either makes no reply, or fails to instruct his attorney, or confesses the action and suffers judgment to be at once entered up; or the party to be bound consents to a judge's order authorizing the plaintiff to enter up judgment and issue execution against him, either at once and unconditionally, or on a future day conditionally on non-payment of whatever amount may be agreed upon; or the party to be bound gives a warrant of attorney, that is, authority to an attorney to confess an action of debt or suffer judgment to go by default, the warrant being accompanied by a defeazance declaring it to be merely a security for payment of a certain sum and interest, and providing that no execution shall issue unless default in the payment shall have been made.

The conjunction of a penal clause and a condition avoiding it is common to the judgment debt, recognizance, bond, and stipulation. The Roman Nexum, as we have stated, had apparently the effect of a Judgment debt.

DE CONSENSU OBLIGATIONE.

§ 135. Consensu fiunt obligationes in emptionibus et venditionibus, locationibus, conductionibus, societatibus, mandatis.

§ 136. Ideo autem *istis* modis consensu dicimus obligationes contrahi, q*uia* neque verborum neque scripturae ulla proprietas desideratur, sed sufficit eos qui negotium gerunt consensisse. unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per internuntium, cum alioquin verborum obligatio inter absentes fieri non possit.

§ 137. Item in his contractibus alter alteri obligatur de *eo* quod alterum alteri ex bono et aequo

§ 135. Consent creates a contract in purchase and sale, letting and hiring, partnership, agency.

§ 136. In these contracts consent is said to create the obligation, because no form of words or of writing (nor any delivery) is required, but the consent of the parties is sufficient. Absent parties, therefore, can form these contracts; for instance, by letter or messenger; whereas in Verbal contracts presence is necessary.

§ 137. Further, these contracts are bilateral, that is, both parties incur a reciprocal obligation to per-

praestare oportet, cum alioquin in verborum obligationibus alius stipuletur, alius promittat, et in nominibus alius expensum ferendo obliget, alius obligetur.

form whatever is fair and equal; whereas Verbal and Literal contracts (and the Real contract of mutuum) are unilateral, that is, confer only a right on one party, and impose only an obligation on the other.

§ 138. Sed absenti expensum ferri potest, etsi verbis obligatio cum absente contrahi non possit.

§ 138. Absence is no impediment to Literal contracts, though it is to Verbal.

Besides the four Consensual contracts which are named in the text, certain praetorian and statutory conventions, though not denominated contracts, were enforceable by action. An example of praetorian pacts, or pacts enforced by the praetor, is constitutum or constituta pecunia, which we mentioned when treating of stipulation, as a form of consensual guaranty. An instance of statutory pact, or pact made valid by statute, is donatio inter vivos. It was irrevocable, and the donor could be forced by action to perform his promise. Perficiuntur autem [donationes inter vivos] cum donator suam voluntatem scriptis aut sine scriptis manifestaverit. Et ad exemplum venditionis nostra constitutio eas etiam in se habere necessitatem traditionis voluit, ut etiamsi non tradantur, habeant plenissimum robur et perfectum, et traditionis necessitas incumbat donatori, Inst. 2, 7, 2. 'Donations inter vivos are complete when the donor's intention, whether written or unwritten, has been signified. And, like a sale, they involve the necessity of delivery, so that before delivery they are perfectly valid, and delivery can be recovered by action from the donor.'

DE EMPTIONE ET VENDITIONE.

§ 139. *Emptio et venditio contrahitur* cum de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit. nam quod arrae nomine datur argumentum est emptionis et venditionis contractae.

§ 139. The contract of purchase and sale is complete as soon as the price is agreed upon and before the price or any earnest money is paid. The earnest money is merely evidence of the completion of the contract.

§ 140. Pretium autem certum esse debet: alioquin si ita inter eos convenerit, ut quanti Titius rem aestimaverit, tanti sit em*p*ta, Labeo negavit ullam vim hoc negotium habere; *quam sententiam* Cassius probat: Ofilius et eam empt*ionem putat et ven*ditionem; cuius opinionem Proculus secutus est.

§ 140. The price must be certain. If there is an agreement to purchase at a price to be fixed by Titius, Labeo and Cassius say the contract is invalid, Ofilius and Proculus say it is valid.

§ 141. *Item* pretium in numerata pecunia consistere debet. *nam* in ceteris rebus an pretium esse possit, veluti homo aut toga aut fundus alterius rei *pretium esse possit*, valde quaeritur. nostri praeceptores putant etiam in alia re posse consistere pretium; unde illu*d* est quod vulgo putant per permutationem rerum emptionem et venditionem contrahi, eamque speciem emptionis e*t* venditioni*s* vetustissimam esse; argumentoque utuntur Graeco poeta Homero qui aliqua parte sic ai*t*:

Ἔνθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
Ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἴθωνι σιδήρῳ,
Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι βόεσσιν,
Ἄλλοι δ' ἀνδραπόδεσσιν.

Diversae scholae auctores dissentiunt, aliu*d*que esse existimant permutationem rerum, aliu*d* emptionem et venditionem: alioquin *non posse* rem expediri permutatis rebus, quae videatur res venisse e*t* *qu*ae pretii nomine data esse; sed rursus utramque videri et venisse et utramque pretii nomine datam esse absurdum videri. Se*d* *ait* Caelius Sabinus, si rem Ti*tio* venalem habent*e*, veluti fundum, acceperim, et pretii nomine hominem forte dederim, fundum quidem videri venisse, hominem autem pretii nomine datum esse, *ut* fund*us* acciperetur.

§ 141. The price should be in money, for it is much disputed whether anything but money, such as a slave, a robe, a piece of land, can be treated as price. My school hold the affirmative, and regard exchange as a species, and the oldest species, of purchase and sale; in support of which they quote the lines of Homer:

'Here touched Achaean barks in quest of wine.
They purchased it with copper and with steel,
With hides, with horned cattle, and with slaves.'

The other school maintain the negative, and distinguish between exchange and purchase and sale, because in exchange we cannot determine which is the thing sold and which is the price, and both things cannot be regarded as both the thing sold and the price. Caelius Sabinus says that if Titius offers, say, land for sale, and I give him a slave for it, the thing sold is the land and the price is the slave.

It is necessary to distinguish clearly between the completion of a contract of sale and the subsequent transmutation of property; between the creation of a jus in personam and the creation of a jus in rem; between the acquisition of an obligation and the acquisition of ownership.

The contract is complete as soon as the price is agreed upon, but no property passes until the price is paid and possession is delivered, or, in the case of a sale on credit, until possession is delivered. Quod vendidi et tradidi non aliter fit accipientis quam si, aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione, Dig. 18, 1, 19. 'Sale and delivery do not pass property unless the price is

paid, or security is given for the price, or credit is given without security.' Venditae vero et traditae res non aliter emptori acquiruntur quam si is venditori pretium solverit, vel alio modo ei satisfecerit, velut expromissore aut pignore dato . . . sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri, Inst. 2, 1, 41. 'Sale and delivery do not pass property, unless the vendee pays the price, or gives the vendor security; for instance, by a guarantor discharging the vendee, or by mortgage. If, however, the sale is on credit, ownership immediately passes.'

By English law, if the contract is for the sale of SPECIFIC goods, ready for delivery, there is no distinction between the jus in personam and the jus in rem; the contract is complete and the property passes at one and the same moment.

If the sale is on credit, property passes immediately upon the striking of the bargain or understanding as to terms, even before delivery of the goods.

If the sale is for ready money, there must be a delivery or tender of the whole of the goods or price, or delivery and acceptance of part of the goods or price, before there is any contract, and at the same moment the property is transmuted from the vendor to the vendee.

If the contract is not for the purchase of *specific* goods, but of goods of a certain nature or class, there arises a distinction between property and obligation; for, though the contract is complete, no property passes until the particular goods are ascertained by delivery.

In the sale of land the equitable estate is conveyed by the contract to convey, when perfected by the payment of the purchase-money, and without notice to the party in whom the legal estate is vested: the legal estate is only passed by the subsequent deed. Formerly the deed was a Feoffment which was inoperative without livery of seisin, that is, delivery of possession; but now the deed of Grant passes property without delivery of possession. The assignment of an equitable interest in personal estate is not perfect, as against an assignee for valuable consideration, without notice to the trustee.

By the Code Napoleon delivery is requisite for the transfer of property in movables, but property in immovables is transferred as soon as the contract is complete.

By Roman law, the goods are at the risks of the purchaser as soon as the contract is complete, and before the property is transmuted. The formula, res perit domino, therefore, does not apply to

the contract of purchase and sale, but only to the contracts of mutuum and commodatum.

In English law, the risk always belongs to the person in whom the property resides, and the maxim, res perit domino, is applicable to sales.

§ 139. Arrha, as a general rule, was evidence of the completion of contract, but not always, at least in the time of Justinian. If the parties so agreed, arrha was only a penal sum, whose forfeiture entitled either negotiator to recede from a negotiation or rescind a completed contract, Cod. 4, 21, 17. In the absence of such special agreement, in default of voluntary performance, performance could be enforced by action, and forfeiture of the arrha was cumulative upon and additional to specific performance: the vendee, if he was in default, could not reckon the arrha as part of the purchase-money; and the vendor, if in default, besides delivery of possession and repayment of the arrha, was compelled to pay an equal sum to the vendee.

In English law, the earnest is not an evidence of a contract, but, where it occurs, an essential part of the contract, which, therefore, is not Consensual, but Real.

§ 140. Where the price is left to be fixed by an arbitrator, Justinian enacted, in conformity with the opinion of Proculus, that the contract is binding if the arbitrator makes his valuation.

§ 141. After the time of Gaius, a constitution of Diocletian and Maximian (A.D. 286–305), conformably to the opinion of Proculus, declares exchange or barter to be a Real contract. Ex placito permutationis, nulla re secuta, constat nemini actionem competere, Cod. 4, 64, 3. 'An agreement to exchange without part execution cannot support an action.' Accordingly, we have mentioned it as belonging to the miscellaneous class of contracts Real innominate.

The obligation of the vendor was not to transfer quiritarian ownership (ut rem emptoris faciat), but merely to secure the vendee in undisturbed enjoyment (ut praestet habere licere) of the article sold, that is, to give him vacant possession and guarantee him against eviction. Accordingly, if the vendee is judicially molested in his possession, he summons his vendor to defend his title, and, if evicted, recovers against his vendor the loss he has sustained. Venditor si ejus rei quam vendiderit dominus non sit, pretio accepto, auctoritati manebit obnoxius, Paul. Sent. rec. 2, 17, 1. 'A vendor, not proprietor, on receipt of the purchase-money is liable as

warrantor.' Auctoritas est actio pro evictione, Dig. 22, 2, 76. 'Auctoritas is an action on eviction against the vendor.' Caia Seia fundum a Lucio Titio emerat et, quaestione mota fisci nomine, auctorem laudaverat, et, evictione secuta, fundus ablatus et fisco adjudicatus est, venditore praesente. Quaeritur, cum emptrix non provocaverit, an venditorem possit convenire. Herennius Modestinus respondit: Sive, quod alienus fuerit quum veniret, sive, quod tunc obligatus, evictus est, nihil proponi cur emptrici adversus venditorem actio non competat, Dig. 21, 2; 73, 1. 'Caia Seia bought an estate of Lucius Titius, and being sued by the imperial treasury, vouched the vendor to warrant her title, and was evicted in his presence. Consulted, whether, by not appealing, the purchaser had lost her action for breach of warranty, Modestinus advised that, whether evicted by a proprietor or by a mortgagee, there was nothing in the facts proposed to deprive the purchaser of her remedy against the vendor.'

A sale was often accompanied by stipulations binding the vendor to repay twice the purchase-money in case of eviction, or in case the article sold was returned for unsoundness (duplae stipulatio). In the absence of express warranty the English law, applying the rule of Caveat emptor, except in the sale for a fair price of goods in the possession of the vendor, refuses to assume an implied warranty or covenant of title, or, except in certain exceptional circumstances, to assume an implied warranty of the goodness or soundness of the articles sold. But by Roman law, in the absence of such stipulations, warranty of the title and quality of the goods was held to be inherent in the contract of sale. In the case of faults of quality the purchaser could either recover part of the purchase-money by actio aestimatoria, or rescind the contract by actio redhibitoria.

By English law mere inadequacy of price affords no ground for setting aside a sale, unless it be so gross as to afford a necessary presumption of fraud and imposition, and then a court of equity will grant relief. By Roman law a vendor could rescind a contract for the sale of land on proof that the purchase-money was only half the value, Cod. 4, 44, 2.

Peculiar to the English law of sale is the provision of the Statute of Frauds, that contracts for the sale of lands must be in writing signed by the party to be charged: and contracts for the sale of goods for the price of £10 and upwards are not good unless in writing signed by the party to be charged, or unless the buyer

accept and receive part of the goods, or unless he give something in part payment or in earnest to bind the bargain.

So far as delivery or payment is essential to the completion of the contract of sale, it is clear that the contract is not Consensual, but Real.

DE LOCATIONE ET CONDUCTIONE.

§ 142. Locatio autem et conductio similibus regulis constituuntur: nisi enim merces certa statuta sit, non videtur locatio et conductio contrahi.

§ 142. Letting and hiring are governed by rules like those of purchase and sale. Unless the sum to be paid as hire is fixed, the contract is not complete.

§ 143. Unde si alieno arbitrio merces permissa sit, velut quanti Titius aestimaverit, quaeritur an locatio et conductio contrahatur. qua de causa si fulloni polienda curandave, sarcinatori sarcienda vestimenta dederim, nulla statim mercede constituta, postea tantum daturus quanti inter nos convenerit, quaeritur an locatio et conductio contrahatur.

§ 143. And if the hire is to be fixed by an arbitrator, for instance, at the sum which Titius shall consider fair, it is a question whether there is a contract of letting and hiring. Accordingly, if I give clothes to a fuller to clean or finish, or to a tailor to mend, and the remuneration is not fixed at the time, but left to our subsequent agreement, it is a question whether there is a contract of letting and hiring.

§ 144. Vel si rem tibi utendam dederim et invicem aliam rem utendam acceperim, quaeritur an locatio et conductio contrahatur.

§ 144. The same question arises if I lend a thing for use and receive in return the loan for use of another thing.

§ 145. Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quaeri soleat utrum emptio et venditio contrahatur, an locatio et conductio. veluti si qua res in perpetuum locata sit, quod evenit in praediis municipum quae ea lege locantur, ut quamdiu id vectigal praestetur, neque ipsi conductori neque heredi eius praedium auferatur; sed magis placuit locationem conductionemque esse.

§ 145. Purchase and sale are so nearly akin to letting and hiring that in some cases it is a question under which category a contract falls; for instance, when land is leased in perpetuity, as occurs with the land of municipalities, which is leased on the condition that, so long as the rent is paid, the lessee and his heirs shall continue in possession. But here the better opinion is that the contract is one of letting and hiring.

§ 146. Item si gladiatores ea lege tibi tradiderim, ut in singulos qui integri exierint pro sudore denarii XX mihi darentur, in eos vero singulos qui occisi aut debilitati fuerint, denarii mille: quaeritur utrum emptio et venditio, an locatio et conductio contrahatur. et magis

§ 146. If a band of gladiators are delivered on the following terms, that is to say, that for the performance of every one who leaves the arena safe and sound there shall be paid twenty denarii, and for every one who is killed or disabled there shall be paid one thousand denarii,

placuit eorum qui integri exierint locationem et conductionem contractam videri, et eorum qui occisi aut debilitati sunt emptionem et venditionem esse: idque ex accidentibus apparet, tamquam sub condicione facta cuiusque venditione an locatione. iam enim non dubitatur, quin sub condicione res veniri aut locari possint.

it is disputed whether the contract is one of purchase and sale or of letting and hiring; but the better opinion is that the unharmed were let and hired, the killed or disabled were bought and sold, the contracts depending on contingent events, and each gladiator being the subject of a conditional hiring and a conditional sale, for it is certain that both hiring and sale may be conditional.

§ 147. Item quaeritur, si cum aurifice mihi convenerit, ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret, et acciperit verbi gratia denarios CC, utrum emptio et venditio, an locatio et conductio contrahatur. Cassius ait materiae quidem emptionem venditionem contrahi, operarum autem locationem et conductionem. sed plerisque placuit emptionem et venditionem contrahi. atqui si meum aurum ei dedero, mercede pro opera constituta, convenit locationem conductionem contrahi.

§ 147. Again, if a goldsmith agrees to make me rings of a certain weight and fashion out of his own gold for, say, two hundred denarii, it is a question whether the contract is purchase and sale or letting and hiring. Cassius says the material is bought and sold, the labour is let and hired, but most writers hold that there is only a purchase and sale. If I provide the gold and agree to pay him for his work, the contract is clearly a letting and hiring.

§ 143. Justinian decided that a hiring for a sum to be fixed by an arbitrator was valid, like a sale on similar terms, if the arbitrator made his award; but that if the sum was left to the future agreement of the parties, or, § 144, if the consideration was not pecuniary but a reciprocal service, the convention was not a Consensual one of letting and hiring, but a Real contract innominate, deriving its validity from part execution, and to be enforced by the action in factum praescriptis verbis, Inst. 3, 24, 1.

§ 145. Where Gaius speaks of ager vectigalis, Justinian speaks of ager emphyteuticus or emphyteuticarius, because in his days the rules of these two kinds of tenure had been entirely assimilated. Ager vectigalis was land leased by the Roman people, or a municipality, or a sacerdotal college, or the Vestal Virgins, for various terms of years, for a rent either in money or in produce, usually amounting to one fifth or one seventh of the profits. Emphyteusis was the grant of land in perpetuity, or for a term of years, for an annual rent, subject to forfeiture, without claim for meliorations, on non-payment of rent by the emphyteuta for three years, or for two

years if the land was held of the church. Land held in emphyteusis was alienable, devisable, descendible by intestacy. The proprietor, however, had a right of pre-emption, and a fine for admission of a devisee or alienee of one fiftieth of the value, Cod. 4, 66; Novella, 120.

Emphyteusis resembled locatio in that the property remained in the grantor; it resembled venditio in that the grantee acquired not only detention of the land granted, like the hirer (colonus), but also possession, properly so called, and a proprietary right (jus in re, or, servitude) that nearly amounted to property or dominion, and could be maintained by vindicatio or real action against all the world, including the nude or nominal proprietor.

Zeno (A. D. 475–491) decided that Emphyteusis was a contract sui generis, distinct from both locatio and venditio, and requiring for its validity to be reduced to writing, Cod. 4, 66. Compare a similar provision of the English Statute of Frauds for all contracts relating to land.

Like pignus, emphyteusis is a combination of jus in personam and jus in rem, the one created by convention in writing, the other by tradition.

§ 146. Gladiators were either (1) prisoners of war, 'butchered to make a Roman holiday,' or slaves who had committed some offence, 1 § 13, or criminals under a capital sentence; or (2) freemen who voluntarily adopted the profession and hired themselves out (auctorati, 3 § 199) to persons who maintained troops or companies (ludi familiae) of gladiators, either to make a profit, or to win the favour of the public, by their exhibition. The first gladiatorial show at Rome was exhibited B. C. 264. The passion of the populace for these exhibitions in the palmy days of Rome amounted to a mania; and a vast revolution in public sentiment was implied in their suppression, A. D. 325, by the following constitution of Constantine: Cruenta spectacula in otio civili et domestica quiete non placent; quapropter omnino gladiatores esse prohibemus, Cod. 11, 43. 'Bloody spectacles are out of place in the reign of law and the peaceful bosom of a fatherland; and gladiatorial shows, therefore, are absolutely prohibited.'

Locator denotes the person who furnishes land or a house or other article to be used by another; conductor is the person who takes the land or house (called colonus in the first case, inquilinus in the second) or other article and pays a price in money for its use. But in the case of opus faciendum, e. g. of a building to be con-

structed, or an article to be manufactured, the person who pays the price, that is to say, the employer or orderer, is called locator; the person who performs the work or construction and receives the price is called conductor. It may be worth inquiring how this anomaly arose, and what led to this inversion of the meanings of these correlative terms, and we shall find it in a certain incident common to these and other conventions, and which has induced the English law to regard them as composing a single class and to denote them by a common denomination.

Deposit, loan for use, pawn or pledge, letting and hiring, and mandate, are grouped together in English law under the head of Bailments. Bailment, derived from the French word bailler, 'to deliver,' is defined to be a delivery of a chattel (movable) in trust for a specific purpose; or, at greater length, a delivery of goods on a condition that they shall be restored by the bailee to the bailor, or according to his direction, as soon as the purpose for which they were bailed shall be answered. These contracts, then, all imply a delivery from the bailor to the bailee and a redelivery from the bailee to the bailor or his order. Now in locatio-conductio operis faciendi, there is usually a delivery and a redelivery: for instance, goods are delivered to an innkeeper to be kept, or to a carrier to be transported, or materials are delivered to a manufacturer to be fashioned, and these goods and materials are to be redelivered at another time, or in another place, or in an altered form. It is this delivery and redelivery to which the Latin language always looks exclusively in fixing on the persons to be denoted respectively by the words locator and conductor; and, accordingly, by locator it denotes the bailor, and by conductor the bailee, without regarding the fact that while in locatio-conductio rei or operarum the locator supplies a service for which the conductor pays the price, in locatio-conductio operis faciendi it is the locator who pays the price and the conductor who performs the service.

Colonus, or the independent person who entered into a contract of locatio-conductio respecting land, must be distinguished from the colonus who mainly composed the agricultural population under the empire. Colonatus, the condition of the latter colonus, is an institution whose origin is obscure, but which probably began to be common as early as A. D. 200. Colonatus was not a mere obligation or jus in personam, but a real right or jus in rem, and may be regarded as a new form of dependent status, a condition of subjec-

tion to a superior, which may be classified with the status of familia or domestic relations. It was a condition midway between freedom and slavery. The colonus was liber and civis, but he was called by the lawgiver servus terrae. He was inseparably bound to the soil: a fugitive colonus, like a fugitive slave, was said to commit a theft of his own body, and he could be recovered by real action (vindicatio) from any one who gave him harbour. He had property, but it was called peculium, and, though he could not be deprived of it like the slave, yet he could not aliene it without the consent of his lord. With certain exceptions, he could not maintain an action against his lord, who was called his patronus. Neither a colonus nor his descendants could divest themselves of their hereditary serfdom. The colonus, having no Real right in the soil, paid no land tax, but only a personal or capitation tax, like artisans and slaves. As having an inherited condition, the colonus or inquilinus was called originarius; as subject to the capitation tax he was called tributarius, capite censitus, adscriptitius, censibus adscriptus. He paid to his lord a certain annual rent (canon), usually in kind, and always incapable of augmentation. This fixity of his rent was the principal right which he enjoyed. See Savigny's Vermischte Schriften, 15. If, seeking in Roman law for types of Feudal institutions, we find the germ of freehold tenure in Emphyteusis, the antitype of copyhold tenure may similarly be discovered in Colonatus.

DE SOCIETATE.

§ 148. Societatem coire solemus aut totorum bonorum, aut unius alicuius negotii, veluti mancipiorum emendorum aut vendendorum.

§ 148. A partnership either extends to all the goods of the partners or is confined to a single business, for instance, the purchase and sale of slaves.

§ 149. Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. quod Quintus Mucius etiam *contra naturam societatis esse censuit; sed Servius Sulpicius, cuius* praevaluit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa videatur, ut aequum sit eum

§ 149. It has been much canvassed whether the law would recognize a partnership formed on the terms that a partner should have a greater share in the profit than he has in the loss. Quintus Mucius thought such an arrangement contrary to the nature of partnership, but Servius Sulpicius, whose opinion has prevailed, held that such a partnership was so far from invalid that a partnership might be formed on the terms that a partner should

cum hac pactione in societatem admitti. nam et ita posse coire societatem constat, ut unus pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia valet.

have a share in the gains and none in the losses, if the value of his services made such an arrangement fair. It is certain that a partnership may be formed on the terms that one partner shall contribute all the capital and that the gains shall be divided equally, for a man's services may be equivalent to capital.

§ 150. Et illu*d* certum est, si de partibus lucri et damni nihil inter eos convenerit, tamen aequis ex partibus commodum *e*t incommodum inter eos commune esse. sed si in altero partes expressae fuerint velut in lucro, in altero vero omissae, in eo quoque quod omissum est similes partes erunt.

§ 150. If no agreement has been made as to the division of the profit and loss, it must be in equal shares. If the shares are expressed in the event of profit but not in the event of loss, the loss must be divided in the same proportions as the profit.

§ 151. Manet autem societas eousque, donec in eodem sensu perseverant: at cum aliquis renuntiaverit societati, societas solvitur. sed plane si quis in hoc renuntiaverit societati, ut obveniens aliquod lucrum solus habeat, veluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc ren*unt*iav*e*rit *s*ocietati, ut hereditatem solus lucrifaciat, cogetur hoc lucrum communicare. si quid vero aliu*d* lucri fecerit quod non captaverit, ad ipsum solum pertinet. mihi vero, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur.

§ 151. The continuance of partnership depends on the continuing consent of the members: the renunciation of one dissolves the partnership. If, however, the object of a partner in renouncing the partnership is to monopolise some accruing gain; if, for instance, a partner in all goods succeeds to an inheritance and renounces the partnership in order to have exclusive possession of the inheritance, he will be compelled to divide this gain with his partners; but what he gains undesignedly he keeps to himself; and his partner always has exclusive benefit of whatever accrues to him after the renunciation.

§ 152. Solvitur adhuc societas etiam morte socii; quia qui societatem *contrahit* cer*ta*m personam sibi eligit.

§ 152. Dissolution of partnership is also produced by the death of a partner, for he who enters into partnership elects a determinate person with whom he is willing to be partner.

153. Dicitur et capitis diminutione solvi societatem, quia civili ratione capitis diminutio morti *aequiparari* dicitur: *sed* si *ad*huc consentiant in societate*m*, nova videtur incipere societas.

§ 153. Loss of status also determines partnership, because in the civil law loss of status is regarded as equivalent to death; but if the members still consent to be partners, a new partnership commences.

§ 154. Item si cuius ex sociis bona publice aut privatim venierint,

§ 154. Again, the sale of all the property of one of the partners,

solvitur societas. sed hoc *quoque casu* societas de *qua* loquimur *nova* consensu contrahitur nudo ; iuris *enim* gentium *obligationes contrahere* omnes homines naturali ratione *possunt*.

whether by the state or by private creditors, dissolves the partnership; but here also a new partnership may be formed by mere consent, for contracts of natural law are within the capacity of all men [even after loss of civitas, or capitis minutio media].

§ 148. In the absence of express convention a partnership is limited to gains by commercial transactions (universorum quae ex quaestu veniunt) and excludes gains by inheritance, devise, donation. A remarkable incident of unlimited partnership (universorum bonorum) was the transmutation of property operated by mere convention without delivery. In societate omnium bonorum omnes res quae coeuntium sunt continuo communicantur; quia licet specialiter traditio non interveniat, tacita tamen creditur intervenire, Dig. 17, 2, 1, 1. 'In partnership of all goods, the property of all the members becomes forthwith common, a constructive delivery being implied in the absence of actual delivery.' This rule was not applied to other forms of partnership.

§ 149. Although a partner might be exempt by the terms of the convention from any share in the losses, yet a convention that a partner should have no share in the gains was called a leonine convention, and being devoid of consideration could not be enforced. Aristo refert, Cassium respondisse, societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentiret, et hanc societatem leoninam solitum appellare, et nos consentimus, Dig. 17, 2; 29, 2. 'Aristo records the decision of Cassius that a partnership on the terms that one should take all the profits and another bear all the loss, which he called a leonine partnership, is not binding, and Ulpian concurs.'

§ 153. Of the three kinds of capitis minutio, maxima, media, and minima, that is to say, loss of libertas, loss of civitas, loss of domestic status, only capitis minutio maxima and media operate a dissolution of partnership. Societas quemadmodum ad heredes socii non transit, ita nec ad arrogatorem, ne alioquin invitus quis socius efficiatur cui non velit; ipse autem arrogatus socius permanet; nam etsi filiusfamilias emancipatus fuerit, permanebit socius, Dig. 17, 2; 65, 11. 'Partnership passes neither to the heir nor to the adrogator of a partner, otherwise it might be involuntary; but an independent person who becomes dependent by adrogation, and a

filiusfamilias who becomes independent by enfranchisement, continue partners.'

§ 154. The forced sale of a person's whole estate might be the result of either a criminal or a civil proceeding, either condemnation for crime or insolvency, and in the latter case for the benefit either of the State or of private creditors. Damnatione bona publicantur cum aut vita adimitur aut civitas aut servilis conditio irrogatur, Dig. 48, 20, 1. 'Condemnation forfeits all a criminal's goods to the treasury, if it deprives of life, or involves loss of civitas (capitis minutio media), or loss of liberty (capitis minutio maxima).'

Confiscation (publicatio) under its ancient name of sectio bonorum, has already, 3 § 80, been mentioned. The quaestors of the treasury were sent into possession; the sale, which was publicly advertised (proscriptio), took place under the spear (sub hasta), the symbol of absolute dominion, and vested in the purchaser (sector) quiritarian ownership.

DE MANDATO.

§ 155. *Mandatum* consistit *sive* nostra gratia mandemus sive ali*ena*, *id est sive ut mea* negotia geras, sive u*t* alterius *mandem tibi*, *erit inter nos* obligatio, et invicem alter *al*teri tene*b*imur, id*eoque iudicium* erit *in id quod paret te* mihi bona fide praestare oportere.

§ 155. Agency may contemplate the benefit either of the principal or of a stranger; that is to say, your undertaking at my request to transact my business or the business of a third person will create an obligation between us, and make us mutually liable and compellable to satisfy the demands of good faith.

§ 156. Nam si tua gratia tibi mandem, s*uperv*acu*u*m est mandatum; quod enim tu tua gratia fac*turus* sis, id ex t*ua* sententia, *non* ex meo mandatu facere *videberis*: *ita*que si otiosam pec*unia*m domi te *habere mihi dixeris*, *et* ego te hortatus fuerim, u*t eam* fenerares, quamvis *e*am ei mutuam dederis a quo *servare non* potueris, non tamen habebis mecum man*dati actio*n*em*. it*em* et si hortatus sim, *ut rem a*liquam emeres, q*uamvis* non expedierit tibi eam emisse, non tamen *mandati tibi tenebor*. et adeo haec ita sunt, ut quaeratur an mandati teneatur qui mandavit tibi, ut *Titi*o pecuniam *fenerares* [*desunt* 2½ *lin.*], q*uia* non aliter Titio credidisses, quam si tibi mandatum esset.

§ 156. But if I recommend you to perform anything for your own exclusive advantage, there is no relation of agency, for you will act on your own judgment and not by my commission. If you tell me that you have money lying in your cashbox, and, on my advice to lend it at interest, you lend it to a person from whom you cannot recover it, you will have no action of mandate against me: or if I recommend you to buy, and you lose by buying, I am not liable to be sued in action of mandate. So settled is this, that it has been questioned, whether mandate can be brought on a specific recommendation to lend to Titius; but the prevalent opinion is that of Sabinus, that so specific a recom-

mendation is sufficient to support an action of mandate.

§ 157. Illud *constat, si faciendum quid* mandet*ur* quod contra bonos mores est, non contrahi obligationem, velut si tibi mandem, ut Titio furtum aut iniuriam facias.

§ 157. It is clear that an instigation to do an unlawful act, to steal, for instance, or commit an assault, gives the agent no right of action against the instigator.

§ 158. Item si qui*d* pos*t* mortem meam faciendum *mihi* mandet*ur*, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere non posse.

§ 158. A commission to be executed after the death of the agent is invalid by the general rule that a successor cannot be the original subject of an obligation.

§ 159. Sed recte quoque consummatu*m* mandatum, si dum adhuc integra res sit revocatum fuerit, evanescit.

§ 159. A valid authority is annulled by revocation before a commencement of execution.

§ 160. Item si adhuc integro mandat*o* mors alterutrius alicuius interveniat, id est vel eius qui mandarit, vel eius *q*ui mandatum susceperit, solvitur mandatum. sed utilitatis causa receptum est, ut si mortuo eo qui mihi mandaverit, ignorans eum decessisse exsecutus fuero mandatum, posse me agere mandati actione: alioquin iusta et probabilis ignorantia damnum mihi a*d*feret. et h*uic* simile est quod plerisque placuit, si debitor meus manumisso dispensatori meo per ignorantiam solverit, liberari eum: cum alioquin stricta iuris ratione non posset liberari eo quod alii solvisset quam cui solvere deberet.

§ 160. So the death of either the principal or the agent before a commencement of execution is a revocation of a power: but equity requires that, if after the death of a principal and without having notice of his decease an agent execute his commission, he may recover against the successor of the principal in an action of mandate; for otherwise an unavoidable ignorance would be visited by a legal penalty. Similar to this is the rule which is supported by the weight of authority, that a debtor who pays a manumitted steward without notice of his manumission is discharged of liability; though by the strict letter of the law he is not discharged, because he has not paid the person whom he was bound to pay.

§ 161. Cum autem is cui recte mandaverim egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest *im*plesse eum mandatum, si modo implere potuerit: at ille mecum agere non potest. itaque si mandaverim tibi, ut verbi gratia fundum mihi sestertiis C emeres, tu *sestertiis* CL emeris, non habebi*s* mecum mandati actionem, etiamsi tanti velis mihi dare fundum quanti emendum tibi mandassem. idque

§ 161. If an agent deviates from his instructions, he may be sued for the amount which his principal loses by the non-execution of the instructions, if the execution was possible; and he will have no right of action against the principal. So if I commission you to purchase an estate for, say, a hundred thousand sesterces, and you purchase for a hundred and fifty thousand, you will have no action of mandate against me although you are willing to con-

maxime Sabino et Cassio placuit. Quodsi minoris emeris, habebis mecum scilicet actionem, quia qui mandat ut C milibus emeretur, is utique mandare intellegitur, ut minoris, si posset, emeretur.

vey to me for the price at which I authorized you to buy: so Sabinus and Cassius have decided. If you buy it for less, you will have a right of action against me, for a direction to buy for a hundred thousand sesterces is regarded as an implied direction to buy, if possible, for any smaller sum.

§ 162. In summa sciendum *est*, *quotiens faciendum* aliquid gratis dederim, quo nomine si mercedem statuissem, locatio et conductio contraheretur, mandati esse actionem, veluti si fulloni polienda curandave vestimenta aut sarcinatori sarcienda *dederim*.

§ 162. Finally, the delivery of material to be wrought or fashioned gratuitously, where if a remuneration had been fixed there would have been a letting and hiring, is ground for an action of mandate against the bailee; the fuller, for instance, who receives clothes to be cleaned or bleached, or the tailor who receives them to be mended.

In the contract of agency (mandatum) the principal is called dominus or mandator, the agent procurator or mandatary.

We have already mentioned, when treating of the verbal contract of stipulation, that a guaranty was often given by the consensual contract of mandate. Such a mandate was called MANDATUM QUALIFICATUM. We have the principle explained in § 156 (where the hiatus may be supplied from Justinian: sed obtinuit Sabini sententia obligatorium esse in hoc casu mandatum): he who recommends a third person as of good credit is bound to make good his representation and to indemnify another who sustains damage from giving credit on the faith of that representation. So by English law a person not interested in a transaction who makes a false and fraudulent misrepresentation which induces another to trust and contract with a third person is answerable for the loss occasioned by his misrepresentation.

As such a representation was in effect a guaranty, and to allow an action on a verbal misrepresentation would avoid the Statute of Frauds, which requires a guaranty to be reduced to writing, Lord Tenterden's Act, 9 George IV, chapter 14, enacted that no action shall be brought whereby to charge any person upon any representation or assurance concerning the character, credit, or ability of any other person, to the intent that such other person may obtain money or goods upon credit, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

Another case in which a guarantor and guarantee stand in the relation of mandant and mandatary is DELEGATIO. Tua et mandantis gratia intervenit mandatum, si mandet tibi, ut ipsius periculo stipuleris ab eo quem tibi deleget in id quod tibi debuerat, Inst. 3, 26, 2. 'Both the agent and the principal are beneficially interested in a mandate if the principal directs the agent at the risk of the principal to take a verbal bond from a debtor of the principal in discharge of a debt due from the principal to the agent.' The result of this transaction, compounded of mandate and stipulation, would be two novations, extinguishing the original debts due to and from the principal, and creating a new liability of the principal as guarantor of the substituted debtor. Delegare est vice sua alium reum dare creditori vel cui jusserit, Dig. 46, 2, 11. 'To delegate is to give in one's stead a vicarious debtor to one's creditor or his order.' Quod mihi ab aliquo debetur, id si velim tibi deberi . . . opus est ut jubente me tu ab eo stipuleris; quae res efficit ut a me liberetur et incipiat tibi teneri, quae dicitur novatio obligationis, Gaius, 2 § 38. 'The transfer of a debt requires that on the order of the transferror the transferree should stipulate payment from the debtor, whereupon the debtor is discharged of liability to the transferror and becomes bound to the transferree, which change is called NOVATION' (p. 399). In this Roman practice of discharging liabilities substitution of another person as debtor, of which we have already had an example in the form of literal contract called transcriptio, we may see a parallel to the modern practice of discharging debts by means of bills of exchange.

Mandate might be employed to operate a virtual transfer of obligation, without Delegation or Novation, which was not always practicable as it required the concurrence of the debtor, by CESSIO ACTIONUM—the mere transfer of the right of action (mandare, cedere, praestare actiones). The transferror made the transferree his processual representative and that on the transferree's own account (procurator in rem suam): that is, gave him a procuration or power of attorney, which enabled him to sue either entirely in the name of the transferror, or, employing the formula Rutiliana, partly in the name of the transferror and partly in the name of the transferree, naming the transferror in the intentio and the transferree in the condemnatio, 4 § 35: and in either case entitled him to retain whatever sum he recovered.

In the later period of the law the transferree of an obligation

might even sue in his own name on the Cautio of a debtor by a fictitious action called actio utilis. Here we may seem to have in full bloom the institution of negotiable paper, that is, written promises to pay, transferable from person to person, and giving the transferree a right to sue in his own name.

In the Roman practice, however, we are far from a complete system of transferable obligation. The ceded or assigned obligation was never completely detached from the person and liabilities of the preceding creditor. The cessionary or assignee was open to all the exceptions that might have been opposed to the original creditor: e.g. to compensatio, or reduction by the amount of a counterclaim; to exceptio non numeratae pecuniae, or plea of want of consideration; and to exceptio of lex Anastasiana, a statute which prohibited any vendee of a debt from recovering, out of its nominal amount, more than the price at which it was actually purchased. And similar objections might be raised in respect of any creditor intermediate between the original assignor and the final assignee. The complete transferability of obligations was unknown to jurisprudence until modern legislation gave validity to contracts with an incerta persona, i.e. with a person unascertained except as member of a class; in other words, to papers payable to the Holder or Bearer.

In such papers, which are subjects of property or ownership, the incorporeal obligation is, as it were, incorporated, and Obligation is transformed into Dominion. We have instances of such papers (called negotiable) in Promissory Notes, Bills of Exchange, State obligations (documents expressing a claim against a government for a certain amount of capital debt, and having annexed to them coupons, representing claims of periodic interest), and Debentures of industrial corporations (certificates of Shares in such industrial companies, though similar to Debentures as entitling the Holder to certain dividends or shares in the profits, are foreign to our present purpose, because they essentially and originally relate to Property or jus in rem, not to Obligation or jus in personam, the Shareholders being co-proprietors). By the use of such negotiable papers the transferability of Obligation is raised to a level with the transferability of Dominion, Savigny, Obligationenrecht, 62–70.

§ 161. The doctrine of Sabinus that if an agent exceed his powers in the price at which he purchases, the principal is not bound for the purchase money even after deduction of the unauthorized excess, was overruled, as we are informed by Justinian.

§ 162. It is only in exceptional circumstances, such as those here mentioned, that the contract of mandatum can fall under the head of Bailment.

The gratuitous character of mandatum is rather nominal than real. The professor of a liberal art could recover a remuneration which, however, was disguised under the name of salarium or honorarium, and could not be sued for by action of mandate before an ordinary judge, but was a matter for the extraordinary cognizance of the praetor or chief minister of justice. Adversus eum cujus negotia gesta sunt, de pecunia quam de propriis opibus vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri. De salario autem quod promisit, apud praesidem provinciae cognitio praebebitur, Cod. 4, 25, 1. 'The employer whose business you transacted, as to the moneys out of your own pocket or taken up at a loan which you spent for his use, may be forced by action of mandate to reimburse you the principal and interest. The salary which he promised must abide the decision of the president of the province.' Under the liberal professions are included advocates, physicians, oculists, aurists, dentists, copyists (librarii), short-hand writers (notarii), accountants, schoolmasters, nurses, rhetoricians, grammarians, geometers, land surveyors. The professors of philosophy and of civil law may receive fees voluntarily offered, but their functions are so exalted that it would be unseemly in them to ask for a pecuniary remuneration even at the tribunal of the praetor, Dig. 50, 13.

The law of agency or representation was only slowly developed in Roman jurisprudence. Originally the cases in which a contractor could bind a principal to his contractee or the contractee to a principal were confined to contracts by persons under power, that is to say, sons or slaves.

The right acquired by a son or slave was acquired for the father or master, 3 § 163, and if the contract was made by the order or for the use of the father or master, he was suable by the contractee, 4 §§ 70–74. But in other cases the benefit or burden of a contract was confined to the parties contracting. The procurator or agent contracted with a third party in his own name: the third party recovered his dues from the agent by an action on the contract: and the agent would in turn recover his from the principal by an action on the mandate. There was no immediate relation between the third party and the principal, and any action in which the third

party sued the principal or vice versa, could have only resulted from CESSIO ACTIONUM, i.e. a transfer of obligations between the agent and principal, or the agent and the contractee.

However, in process of time the law recognized the appointment of a cognitor or representative of a party to a suit, and such cognitor was to all intents and purposes identified with his principal, 4 § 83.

Furthermore, the manager of a shop (institor), and captain of a ship were enabled by praetorian legislation to bind the employer and shipowner (exercitor) to third parties by means of the actions institoria and exercitoria, 4 § 71. This was gradually extended so as to allow to all persons who contracted with an agent a right of action, called quasi institoria, against his employer.

The praetors went even beyond the precedent furnished by institoria, and allowed to principals a converse or obverse immediate right of action against third parties who had contracted with agents. Quod procurator ex re domini, mandato non refragante, stipulatur, invito procuratore dominus petere potest, Dig. 3, 3, 68. 'When an agent, dealing with the interests of his principal and in accordance with his instructions, makes a contract, the consent of the agent is not required to entitle the principal to sue.' When the praetors, proceeding by timid and hesitating steps, had reached this point, the Roman law of agency had become identical with the system we find established in modern Europe. Under this system it is a general rule, that when an agent is duly constituted and discloses the name of his principal, so as to enable the party with whom he deals to have recourse to the principal, and contracts in his name and on his behalf, and does not exceed his authority, the principal is responsible and not the agent. The only reservation to be made is the following: In contracts governed by Jus gentium the relation of Agency was recognized in its fullest development: in Formal contracts, or contracts governed by the Civil law (of which in the last period of Roman Jurisprudence the only surviving instance was Stipulatio), the primitive law, ignoring Agency, had so far left its traces, that the principal could not sue or be sued on the contracts of his Agent by actio Directa, but only by actio Utilis; that is, by a formula involving, by permission of the judicature, a certain amount of Fictitious supposition. See above, § 103.

After explaining obligations founded on contract, Justinian

treats of a miscellaneous group of obligations which are neither founded on contract nor on delict, and which, as the circumstances in which they arise resemble more or less the circumstances of one or other of the legal conventions, are denominated by the name of obligations quasi ex contractu. These demand from us a brief notice.

Three of them, namely, those which ground the actions by or against a tutor, by or against a curator, by or against an unauthorized agent (negotiorum gestor), clearly resemble obligations founded on the contract of mandate. The ward and minor stand to the tutor and curator nearly in the relation of principal and agent, although they are legally incompetent to give an authority (mandatum) or confer a power of administration. A person who, in the absence and without the knowledge of another, officiously interfered to protect his interests (voluntarius procurator) incurred liability and acquired rights against the person in whose affairs he interfered. English law does not recognize a title to compensation in the case of officious interference, unless we find a parallel in the rights of salvors in the case of property lost or endangered on the ocean.

Three other obligations quasi ex contractu, those that are enforced by an action for division of common property between tenants in common (communi dividundo), by action for partition of an inheritance between co-successors (familiae erciscundae), by an action for demarcation of boundaries between adjoining landowners (finium regundorum), resemble the obligations arising in partnership. These actions are distinguished from all others by the adjudicatio, a clause in the formula which empowered the judex by the mere effect of his judgment to operate a transmutation of property. They are called mixed actions by Ulpian, because both parties are equally plaintiff and defendant, Dig. 44, 7; 37, 1; by Justinian, because they are both real and personal, that is, embrace questions both of ownership and obligation; but were regarded by the jurists as properly personal actions, because they contemplate a transfer of property and condemnation of one or other of the parties, in case of inequality of apportionment, in pecuniary damages by way of compensation.

The obligation of a heres to a legatee, enforceable by actio legati (condictio ex testamento), is another case of obligation quasi ex contractu. The aditio of the hereditas may be regarded as a

promise to satisfy the bequests. Aditio is called Obligatio, 2 §§ 35, 36.

Again, money paid by mistake or without consideration (indebitum solutum) created an obligation to repay, enforceable by indebiti soluti condictio, which closely resembles the obligation created by the contract of mutuum.

PER QUAS PERSONAS NOBIS OBLIGATIO ACQUIRATUR.

§ 163. Expositis generibus obligationum quae ex contractu nascuntur, admonendi sumus adquiri nobis non solum per nosmet ipsos, sed etiam per eas personas quae in nostra potestate manu mancipiove sunt.

§ 164. Per liberos quoque homines et alienos servos quos bona fide possidemus adquiritur nobis; sed tantum ex duabus causis, id est si quid ex operis suis vel ex re nostra adquirant.

§ 165. Per eum quoque servum in quo usumfructum habemus similiter ex duabus istis causis nobis adquiritur.

§ 166. Sed qui nudum ius Quiritium in servo habet, licet dominus sit, minus tamen iuris in ea re habere intellegitur quam usufructuarius et bonae fidei possessor. nam placet ex nulla causa ei adquiri posse: adeo ut etsi nominatim ei dari stipulatus fuerit servus, mancipiove nom*in*e eius acceperit, quidam existim*e*nt nihil ei adqu*i*ri.

§ 167. Co*m*munem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accipiendo illi soli adquirit, veluti cum ita stipuletur: TITIO DOMINO MEO DARI SPONDES? aut cum ita mancipio accipiat: HANC REM EX IURE QUIRITIUM LUCII TITII DOMINI

§ 163. Having thus classified obligations produced by contract, we remark that obligations may be acquired not only by our own contracts, but also by the contracts of persons in our power, in our hand, in a state of mancipation to us.

§ 164. Freemen, also, and the slaves of another person, acquire for the person who possesses them in bona fides; only, however, in two circumstances, that is to say, when they acquire by their own labour, or in dealing with the property of the bona fide possessor.

§ 165. A usufructuary slave acquires for the tenant for life under the same conditions.

§ 166. The owner of the naked quiritary property in a slave has less right in his acquisitions than the tenant for life or bona fide possessor; for under no circumstances do the acquisitions of the slave enure to his benefit; and even when expressly named by the slave in a stipulation or mancipation, according to some authorities, the nude proprietor acquires no right.

§ 167. A common slave acquires for all his proprietors in the proportion of their property, unless he names one exclusively in a stipulation or mancipation, in which case he acquires for him alone. For instance, if he stipulates thus: 'Dost thou promise to convey to Titius, my master?' or, when he takes

MEI ESSE AIO, EAQUE EI EMPTA ESTO HOC AERE AENEAQUE LIBRA.

by mancipation, thus: 'This thing by quiritary law I declare to be the property of Lucius Titius, my master, and for him be it purchased by this bronze ingot and this scale of bronze.'

§ 167*a*. Illu*d* quaeritur *num* quod *unius* domini nomen adiectum *ef*ficit, idem faciat unius ex dominis iussum intercedens. nostri praeceptores perinde ei qui iusserit soli adquiri existimant, a*t*que si nominatim ei soli stipulatus esset servus, mancipiove acc*e*pisset. diversae scholae auctores proinde utrisque adquiri putant, ac si nulli*us* iussum intervenisset.

§ 167*a*. It is a question, whether the same effect is produced by the exclusive order of one of the masters, as by the exclusive mention of the name of one. My school maintain that the sole orderer is the sole acquirer, just as when one alone is named by the slave in a stipulation or mancipation; the other school maintain that all the owners acquire, just as if there had been no order.

§ 163. Justinian enacted, as we have seen, that while the peculium profectitium of the filiusfamilias, that is, the peculium which he derived from the grant of his father, remained the property of the father; and while in respect of peculium castrense and quasi castrense the son was paterfamilias, or absolute owner; in respect of peculium adventitium, that is, other peculium derived from any other source than the estate of the father, only the usufruct or life estate should vest in the father, the property or reversion remaining in the son. In respect of the obligations acquired by the son, the same principle was to prevail. Ut tamen quod per liberos quos in potestate habetis ex obligatione fuerit acquisitum, hoc dividatur secundum imaginem rerum proprietatis et usus fructus quam nostra discrevit constitutio: ut quod actione quoquomodo commodum perveniat, hujus usumfructum quidem habeat pater, proprietas autem filio servetur, scilicet patre actionem movente, secundum novellae nostrae constitutionis divisionem, Inst. 3, 28, pr. 'The benefit of the obligations acquired by a son shall be divided, as his property is by our constitution, into reversion and usufruct; so that the proceeds of any action shall vest in the father for life, and in the son in reversion, the whole right of action vesting in the father, according to the distinctions expressed in the statute.'

§ 167*a*. Justinian decided this question in favour of the doctrine of Sabinus, Inst. 3, 28, 13.

To the persons through whom an obligation can be acquired might be added the procurator in the later stage of the law, as

soon as the principal was allowed to sue on the contracts of the agent without the agent's consent or transfer of his right of action.

QUIBUS MODIS OBLIGATIO TOLLATUR.

§ 168. Tollitur autem obligatio praecipue solutione eius quod debeatur. unde quaeritur, si quis consentiente creditore aliu*d* pro alio solverit, utrum ipso iure liberetur, quod nostris praeceptoribus placet: an ipso iure maneat obligatus, se*d* adversus petentem exceptione doli mali defendi debeat, quod divers*ae* sch*olae* *au*ctoribus visum est.

§ 168. Extinction of an obligation is effected chiefly by performance of the thing that is owed. It is disputed, when the creditor consents to the substitution of a different performance, whether there is a discharge of the original obligation, as my school consider, or there is a continuance of the original obligation, though against a demand a counteractive defence (an averment of an independent counter obligation) may be made by the exception of fraud, as the other school maintain.

§ 169. Item per acceptilationem tollitur obligatio. acceptilatio autem est veluti imaginaria solutio. quod enim ex verborum obligatione tibi debeam, id si velis mihi remittere, poterit sic fieri, ut patiaris haec verba *me* dicere: QUOD EGO TIBI PROMISI, HABESNE ACCEPTUM? et tu respondeas: HABEO.

§ 169. Acceptilation is another mode of extinguishing an obligation. Acceptilation is an imaginary payment by a solemn form of words. If a creditor is willing to release a debt created by verbal contract, the object may be accomplished by the debtor interrogating him in these terms: 'That which I promised thee hast thou received?' and the creditor answering: 'I have received it.'

§ 170. Quo genere, ut diximus, *tantum hae obligationes solvuntur quae ex verbis consistunt*, non etiam ceterae: consentaneum enim visum est verbis factam obligationem posse aliis verbis dissolvi. *sed* et id quod ex alia causa debeatur potest in stipulationem deduci et per acceptilationem imaginaria solutione *dissolvi.*

§ 170. This process, as I said, only discharges obligations that arise from verbal contract, and no others; for logic seems to dictate that where words can bind, words may also loose. However, a debt due from any other cause may be transformed into a debt on stipulation, and released by an imaginary verbal payment or acceptilation.

§ 171. Tamen mulier sine tutoris auctore acceptum facere non potest; cum alioquin solvi ei sine tutoris auctoritate possit.

§ 171. Observe, that a woman without her guardian's authority cannot release by acceptilation, although her receipt of actual payment without her guardian's authority discharges the debtor.

§ 172. Item quod debet*ur* pro parte recte solvi *int*ell*egitur*: an autem in partem acceptum fieri po*ssit*, *quae*situ*m* est.

§ 172. So a debt may be paid in part, but whether it can be released in part by acceptilation is a question.

§ 173. *Est* etiam alia species imaginariae solutionis per ae*s* et libram. quod et ipsum genus certis in causis receptum est, veluti si quid eo nomine debeatur quod per ae*s* et libram gestum e*s*t, sive qui*d* ex iudicati causa deb*ebitur*.

§ 173. There is another mode of imaginary payment, namely, by ingot and scale. This also is only valid in certain cases, as the release of a debt created by nexum [a disposition or declaration of intention, part of whose declaratory instrument was the ingot and scale], or of a judgment debt.

§ 174. A*d*hibe*ntur* autem non minus quam quinque testes et libripens. deinde is qui liberat*ur* ita oportet loquatur: QUOD EGO TIBI TOT MILIBUS EO NOMINE . . . SOLVO LIBEROQ*UE* HOC AERE AENEAQUE LIBRA. HANC TIBI LIBRAM PRIMAM POSTREMA*M* . . . DE LEGE *IURE* OBLIGATUR. deinde asse percutit libram, *e*um*que* d*a*t e*i* a quo liberatu*r*, veluti solvendi causa.

§ 174. There must be present five witnesses and a holder of the scales, and the debtor to be released must say these words: 'Whereas I am condemned to thee in so many thousand sesterces by such and such a nexum'—or, 'by such and such a judgment'—'that debt I pay and discharge by this ingot and balance of bronze. When I have struck the scale with this first, this last, ingot of bronze, no further obligation by the terms of the nexum'—or, 'by the judgment'—'remains in force.' Then he strikes the scale with the ingot, and gives it to the creditor, as if in payment.

§ 175. Similiter legatarius heredem eodem modo liberat de legato quod per damnationem relictum est, ut tamen *scilicet, sicut iudicatus sententia se damnatum* esse significat, *ita heres defuncti iudicio damnatum se* esse dicat. de eo tamen t*antum* potest hoc modo liberari quod pondere, numero constet; et ita, si certum sit, quidam et de eo quod mensura constat in*tellegendum* existimant.

§ 175. Similarly, the legatee releases the successor from a legacy left in the form of condemnation, except that whereas the other debtors recite their condemnation by the nexum or by the judgment, the successor recites his condemnation by the testament of the deceased. A debt can be thus discharged only if certain in amount and estimated by number or weight, or, according to some, by measure.

§ 176. Praeterea novatione tollitur obligatio, veluti si quod tu mihi debeas a Titio dari stipulatus sim. nam interventu novae personae nova nascitur obligatio, et prima tollitur translata in posteriorem: adeo ut in*ter*dum, licet posterior

§ 176. Novation is another mode of extinguishing an obligation, and takes place when you owe me a sum and I stipulate payment thereof from Titius, for the intervention of a new person gives birth to a new obligation, and the first

stipulatio inutilis sit, tamen prima novationis iure tollatur. veluti si quod mihi debes a Titio post mortem eius vel a muliere pupillove sine tutoris auctoritate stipulatus fuero. quo casu rem amitto: nam et prior debitor liberatur, et posterior obligatio nulla est. non idem iuris est, si a servo stipulatus fuero: nam tunc proinde *ad*huc obligatus tenetur, ac si postea a nullo stipulatus fuissem.

obligation ceases, being transformed into the second. Sometimes, even though the second stipulation is invalid, the first is avoided by novation; for instance, if you owe me a sum, and I stipulate from Titius payment thereof after his death, or if I stipulate payment thereof from a woman or ward without the guardian's authority, in this case my claim is extinguished, for the first debtor is discharged, and the second obligation is void. The same does not hold if I stipulate from a slave, for then the former debtor continues bound, just as if there was no subsequent stipulation.

§ 177. Sed si eadem persona sit a qua postea stipuler, ita demum novatio fit, si quid in posteriore stipulatione novi sit, forte si condicio vel sponsor aut dies adiciatur aut *de*trahatur.

§ 177. But when the original debtor is the promisor, a second stipulation only operates a novation if it contains something new; if a condition, for instance, or a sponsor, or a term is added or omitted.

§ 178. Sed quod de sponsore dixi, non constat. nam diversae sc*h*olae auctoribus placuit nihil ad novationem proficere sponsoris adiectionem aut detractionem.

§ 178. Respecting the sponsor, however, there is a controversy; for the other school hold that novation is not operated by a sponsor being added or omitted.

§ 179. Quod autem diximus, si condicio adiciatur, novationem fieri, sic intellegi *oportet*, ut ita dicamus factam novationem, si condicio extiterit: alioquin, si defecerit, durat prior obligatio. sed videamus, num is qui eo nomine agat doli mali aut pacti conventi exceptione possit summoveri, e*t* vide*a*tur inter eos id actum, ut ita ea res peteretur, si posterioris stipulationis extiterit condicio. Servius tamen Sulpicius existimavit statim et pendente condicione novationem fieri, et si defecerit condicio, ex neutra causa agi posse, *et* eo modo rem perire. qui consequenter et illu*d* respondit, si quis id quod sibi Lucius Titius deberet, a servo fuerit stipulatus, novation*em* fieri et rem perire; quia cum servo agi non potest. sed in utroque casu alio iure utimur: non

§ 179. The statement that a condition introduced operates a novation must be restricted to mean, that a novation is produced if the condition is accomplished; if the condition fails, the prior obligation continues in force. However, it will be a question, whether the creditor who sues on that obligation cannot be repelled by the counteracting plea of fraud, or of accord and agreement; and whether it was not the intention of the parties that the debt should be irrecoverable unless the condition of the second stipulation were realized. Servius Sulpicius even held that novation occurs immediately, and while the accomplishment of the condition is still uncertain; and that, if the condition fails, neither obligation can be sued upon, and the creditor's

magis his casibus novatio fit, quam si id quod tu mihi debeas a peregrino, cum quo sponsi *com*munio non est, SPONDES verbo stipulatus sim.

claim is extinguished; and, consistently herewith, he held that, if the debt of Lucius Titius is stipulated by the creditor from a slave, novation takes place, and while the original obligation is extinguished, the second is void because the slave cannot be sued. But in both cases the contrary rule prevails, and no novation occurs in these cases any more than it occurs if an alien, who cannot be sponsor, promise payment of a debt by the solemn term, 'spondeo.'

§ 180. Tollitur a*d*huc obligatio litis contestatione, si modo legitimo iudicio fuerit actum. nam tunc obligatio quidem principalis dissolvitur, incipit autem *t*eneri reus liti*s* contestatione : se*d* si condemnatus sit, sublata litis contestatione incipit ex causa iudicati teneri. et hoc *est* quod aput veteres sc*rip*tum est, ante litem contestatam dare debitorem oportere, post litem contestatam condemnari oportere, post condemnationem iudicatum facere oportere.

§ 180. The extinction of an obligation is also effected by the commencement of an action, at least of a statutory action [that is to say, an action substituted by statute for any form of statute-process]. Then the original obligation is dissolved, and a new obligation is imposed on the defendant, by the commencement of the action. If he is condemned, the second obligation is discharged, and a third obligation is imposed by the judgment. Hence the saying of the old writers, that, before action brought, a defendant is required by the law to convey; after action brought, he is required to be condemned; after condemnation passed, he is required to satisfy the judgment.

§ 181. Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim, quia inutiliter intendo DARI MIHI OPORTERE; quia litis contestatione dari oportere desiit. aliter atque si imperio continenti iudicio egerim : tunc enim nihilominus obligatio durat, et ideo ipso iure postea agere possum; sed debeo per exceptionem rei iudicatae vel in i*u*dicium deductae summoveri. quae autem legitima *sint* iudicia, et quae imperio contineantur, sequenti *com*mentario referemus.

§ 181. Accordingly, after suing by statutory action, the extinction of the original obligation disables me from bringing a second action, for the declaration that the defendant is bound to convey is false, as the commencement of the first action terminated his obligation to convey. It is otherwise if I sued at first by an action determining with (or, deriving its force from) the praetorship. Then the original obligation continues, and its non-extinction permits me to bring a second action; but I may be repelled by the counteracting plea of

previous judgment or previous litigation. What actions are statutory, and what determine with (or, derive their force from) the praetorship, will be explained in the next book of these Institutions.

§ 168. Gaius only considers at present the modes of extinguishing an obligation, i. e. the modes whereby an obligation ceases to exist. In the next book, 4 § 115, he will treat of the exceptio, that is to say, a defence to an action, whereby, though the right of the plaintiff continues to exist, it is deprived of its operation by being confronted with an adverse right of the defendant; which defence required to be alleged with the permission of the praetor in a special clause of the formula called the exceptio.

Every obligation, as we have seen, 3 § 88, commentary, relates to a certain datio, factio, or praestatio; that is to say, the fulfilment or satisfaction (solutio) of every obligation will consist in datio, factio, or praestatio.

The doctrine of Sabinus, that accord and satisfaction (in solutum datio) operate the extinction of an obligation, was the view that ultimately prevailed. Manifesti juris est, tam alio pro debitore solvente, quam rebus pro numerata pecunia consentiente creditore datis tolli paratam obligationem, Cod. 8, 43, 17. 'It is certain that payment by a third person, and the conveyance of goods instead of money, with the consent of the creditor, discharges an obligation.'

§ 170. Aquilius Gallus, the colleague of Cicero in his praetorship, the pupil of Quintus Mucius and teacher of Servius Sulpicius, was the inventor of formulas relating to dolus malus, Cic. de Off. 3, 14, and a mode of releasing from all obligations by a verbal ceremony. Est prodita stipulatio quae vulgo Aquiliana appellatur, per quam stipulationem contingit ut omnium rerum obligatio in stipulatum deducatur et ea per acceptilationem tollatur. Stipulatio enim Aquiliana novat omnes obligationes et a Gallo Aquilio ita composita est: Quicquid te mihi ex quacunque causa dare facere oportet, oportebit, praesens in diemve aut sub condicione; quarumcumque rerum mihi tecum actio, quaeque abs te petitio vel adversus te persecutio est, erit, quodve tu meum habes, tenes, possides, possedisti, dolove malo fecisti quominus possideas: quanti quaeque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus

Agerius, spopondit Numerius Negidius. Item ex diverso Numerius Negidius interrogavit Aulum Agerium: Quicquid tibi hodierno die per Aquilianam stipulationem spopondi, id omne habesne acceptum? Respondit Aulus Agerius: Habeo acceptumque tuli, Inst. 3, 29, 2. 'There is a stipulation called Aquilian, whereby all obligations are transmuted into a verbal one, and forthwith discharged by acceptilation. For the Aquilian stipulation operates a novation of all pre-existing debts, and is thus expressed: "Whatever thing, on whatever title, thou art or shalt be bound to convey to me or to perform for me now or hereafter, absolutely or conditionally; whatever thing I have or shall have an action, personal, real, or extraordinary, against thee to recover; whatever thing of mine thou hast, detainest, possessest, hast possessed, or hast fraudulently parted with possession of; whatever sum is the value of all these things, that sum dost thou to pay me promise?" so asks Aulus Agerius, and Numerius Negidius answers: "I promise." Then Numerius Negidius asks of Aulus Agerius: "Whatever I have promised thee to-day by the Aquilian stipulation, hast thou received it all in full?" and Aulus Agerius answers: "I have, and have given thee my release."'

The narrative form (stipulatus est, spopondit, interrogavit) in which the transaction is expressed by Justinian, properly belongs, not to the stipulation and acceptilation, but to the written memorandum (cautio) in which they are recorded.

§ 172. It was subsequently an established doctrine that a partial release by acceptilation was valid, Dig. 46, 4, 13.

§ 174. The translation follows the conjectural reading of Lachmann: Quod ego tibi tot milibus eo nomine vel eo judicio damnatus sum, eos nummos solvo liberoque hoc aere aeneaque libra. Hanc ubi libram primam postremam ferii, nihil de lege jure obligatur.

The words prima postrema are found in the form of striking a treaty (foedus ferire) given by Livy, 1, 24: Legibus deinde recitatis, Audi, inquit, Jupiter; audi, pater patrate populi Albani; audi tu, populus Albanus; ut illa palam prima postrema ex illis tabulis cerave recitata sunt sine dolo malo, utique ea hic hodie rectissime intellecta sunt, illis legibus populus Romanus prior non deficiet. Si prior defexit publico consilio dolo malo, tu illo die, Jupiter, populum Romanum sic ferito ut ego hunc porcum hic hodie feriam: tantoque magis ferito quanto magis potes pollesque.

Id ubi dixit, porcum saxo silice percussit. 'After the terms of the treaty had been recited. Hear, high Jove, he exclaimed; hear, thou plenipotentiary of Alba; hear, thou city of Alba: Those terms as they were read aloud from first to last from those tablets and wax without evil intent and as they here to-day are truly understood; those terms the people of Rome will not be first to violate. If they are first to violate them by public resolve with evil intent, do thou on that day, great Jupiter, so strike the people of Rome as I here to-day will strike this swine: and strike thou so much the harder as thou art mightier and stronger. This said, he struck the swine with a hatchet of flint.' The striking with the flint curiously corresponds to the striking with the ingot in the Nexum.

The release of a legacy would be operated per aes et libram, because the will containing the bequest was a transaction per aes et libram, on the principle that all obligations may be released by the process whereby they were contracted. Nihil tam naturale est quam eo genere quidquid dissolvere quo colligatum est, Dig. 50, 17, 35. 'Nothing more natural than the likeness of the means of binding and of unbinding.' Omnia quae jure contrahuntur, contrario jure pereunt, Dig. 50, 17, 100. 'To every legal form of charging corresponds a legal form of discharging.' Fere quibuscunque modis obligamur, iisdem in contrarium actis liberamur, Dig. 50, 17, 153. 'To every mode of obligation there is an obverse mode of liberation.'

It is not so easy to explain why a judgment debt could only be released by the proceeding with the bronze and scales. Perhaps it was considered that a judgment being an act of the State could only be discharged by another act of the State, and that the nexum satisfied this requirement, the witnesses and balance-holder symbolizing the people in assembly, and the declaration of the lex of the nexum symbolizing a legislative enactment. We have an instance of a release from a judgment debt by nexum in Livy. Centurionem, nobilem militaribus factis, judicatum pecuniae quum duci vidisset, medio foro cum caterva sua accurrit et manum injecit. . . . Inde rem creditori palam populo solvit, libraque et aere liberatum emittit, deos atque homines obtestantem, ut M. Manlio, liberatori suo, parenti plebis Romanae, gratiam referant, 6, 14. 'A centurion famed for his valour, being condemned for debt and committed to prison, in the middle of the forum Manlius, with a crowd of followers rushing up, interposes as vindex. . . . Then he pays the

creditor the debt in the presence of the people, and, after the balance and bar of bronze had completed the discharge, delivers the debtor, who called on gods and men to reward his liberator.'

As there are five modes of contracting an obligation, nexu, verbis, literis, re, consensu, there are as many corresponding modes of exoneration. Three of these, re, verbis, nexu, have been mentioned. Gaius says nothing of exoneration literis, but it is clear that as a debt could be constituted by expensilatio, so it could be cancelled by a corresponding accepti relatio.

A consensual contract, not yet followed by partial execution (re nondum secuta, Inst. 3, 29, 4), could be dissolved by a contrary convention. Hae obligationes quae consensu contrahuntur contraria voluntate dissolvuntur, ibid. 'Obligations which consent creates, a contrary accord dissolves.' After a part performance, for instance, a conveyance of the consideration by one of the parties, the contract was not abandoned until the other party had made restitution, Cod. 4, 45, 1.

Not only could the obligation created by consensual contract be extinguished by consent, but obligation created by delict could by certain statutes be obliterated by convention. Legitima conventio est quae lege aliqua confirmatur, et ideo interdum ex pacto actio nascitur vel tollitur quotiens lege vel senatusconsulto adjuvatur, Dig. 47, 10, 6. 'A convention is statutory which derives validity from some statute, and grounds or destroys a right of action.' Thus the obligation and action arising out of outrage (injuriarum) and theft could be extinguished by pact, in the latter case, by enactment of the Twelve Tables.

§ 176. It seems irrational that an invalid contract should be held to operate a novation, but a contract might be valid by Jus gentium though invalid at Civil law; and in respect of Novation naturalis obligatio was placed on a level with civilis obligatio. Novatio est prioris debiti in aliam obligationem, vel civilem vel naturalem, tranfusio atque translatio, hoc est cum ex praecedente causa ita nova constituitur ut prior perimatur. . . . Qualiscunque igitur obligatio est quae praecessit, novari verbis potest, dummodo sequens obligatio aut civiliter teneat aut naturaliter, ut puta si pupillus sine tutoris auctoritate promiserit, Dig. 46, 2, 1. 'Novation is the replacement and commutation of a prior debt by a subsequent obligation, civil or natural; or the destruction of a prior title by the constitution of a second. Every kind of obligation can undergo

novation by verbal contract, provided that the subsequent obligation binds either by law civil or by law natural, as the promise of a ward without his guardian's authority.'

§ 177. We have already seen an instance of novation when treating of delegatio, 2 § 38, the satisfaction of a debt by substitution of a debtor. The substituted debtor who discharges the first is called expromissor, 3 § 139, commentary.

§ 178. We see by Justinian, Inst. 3, 29, 3, that the addition or omission of a fidejussor was finally held to operate a novation.

§ 179. Servius Sulpicius was wrong because novation implies a subsequent obligation, but a conditional obligation is really no obligation until the condition is realized. So if the prior obligation is conditional and the second obligation absolute, the novation is not absolute but conditional, because there is really no prior obligation until the condition is realized, at which moment novation takes place, and the prior obligation is extinguished.

Justinian enacted that no contract should operate a novation, unless the stipulating parties expressly declared their intention that such novation should be produced, Inst. 3, 29, 3.

§ 180. Litis contestatio, Joinder in issue, or the commencement of a suit, denoted, under the system of statute-process, when pleadings were oral, the close of the proceedings in jure, when, the praetor having allowed an action, each party called those who were present to attest the nature of the issue allotted to be tried. Contestari est cum uterque reus dicit: Testes estote. Contestari litem dicuntur duo aut plures adversarii quod ordinato judicio utraque pars dicere solet: Testes estote. Festus. 'Contestation is when both parties exclaim, "Give your attestation." It marks the definitive settlement of the issue to be tried.' Under the formulary system the term was still employed, but marked the moment when the praetor delivered the written formula containing the commission of the judex. Under the third period of the law, when the praetor or highest judicial functionary was himself the judex, that is, no longer delegated the cause to an inferior authority (judex pedaneus), but heard and determined it himself, Litis Contestatio denoted the commencement of the trial before the judex. Lis enim tunc contestata videtur, quum judex per narrationem negotii causam audire coeperit, Cod. 3, 9, 1. 'Litis contestatio is the moment when the judge begins to hear the recital of the cause of action.' By legitima judicia, 4 § 103, Gaius denotes those actions in the formulary pro-

cedure which by provision of the lex Aebutia, whereby statute-process was abolished, were declared to have the same effect, in respect of novation and otherwise, as the statute-process, which they superseded. Actions terminable with the praetorship were such actions as did not derive their validity from the lex Aebutia, but from the administrative power of the praetor.

The transformations of Litis contestatio which are described above were not the last that it was destined to undergo. In the first stage of procedure under the Canon law, after the libellus of the plaintiff had been read aloud, the judge asked the plaintiff whether he abided by his suit; and, on his answer in the affirmative, his libellus was contradicted by the defendant in general terms (nego narrata prout narrantur et dico petita fieri non debere). The detailed contention of the parties over the particular averments of the plaintiff did not follow till a subsequent stage.

In Germany in A.D. 1654 an ordinance of the empire required the defendant to answer all the allegations of the plaintiff and adduce all his own exceptions at the first stage: and, as in practice the reading of the plaintiff's libellus was omitted, the Litis contestatio, or first term or stage of the suit, consisted in this detailed answer of the defendant. Subsequently, when written documents superseded oral procedure, the Litis contestatio was identified with the defendant's delivery of what was called his book of exceptions.

The Novation produced by Litis contestatio is called by modern writers Novatio necessaria. It has not all the incidents of Novatio voluntaria, or Novation induced by convention: for instance, as Litis contestatio must not deteriorate the position of the creditor, the object of its incidents being to remove the disadvantages which he suffers from the duration of the suit, it does not extinguish the accessaries of the principal obligation, e.g. privilegia of widow or infant, &c., interest, hypotheca, p. 352, Dig. 46, 2, 29. It originally, as we have seen, in consequence of the Correality of the Fidejussor, i.e. the unity of his obligation with that of the principal, extinguished the liability of the Fidejussor: but this rule, as we have mentioned, was abrogated by Justinian, who enacted that the liability of the Fidejussor could not be extinguished by Litis contestatio, but only by Solutio.

Nor, secondly, did Novatio necessaria, though it extinguished Civilis obligatio, prevent, like Novatio voluntaria, the continuance of Naturalis obligatio, Dig. 12, 6, 60.

Under Justinian Litis contestatio lost half of its effect: it still retained the positive function of generating a new obligation; but it ceased to have the negative function of extinguishing the old obligation. From this time, accordingly, we cease to hear of process-consumption whether extinctive (litis consumptio ipso jure) as relating to statutory actions, or counteractive (exceptio rei in judicium deductae) as relating to actions dependent on the authority of the praetor. Indeed the former of these (litis consumptio ipso jure) had disappeared long before, contemporaneously with the disappearance of legitima judicia; that is to say, with the abolition of the ordo judiciorum (formulary system), and the transformation of all procedure into cognitio extraordinaria.

Gaius attributes a Novative power not only to Litis contestatio, but also to Judgment (res judicata). Judgment, like litis contestatio, has two functions, one Negative, the other Positive. By its Negative operation it extinguishes the previous right of action: by its Positive it entitles, in the event of Condemnatio, to Execution. The Positive function is in the interest of the plaintiff: the Negative principally in the interest of the defendant. Under Justinian the novative effect of Judgment, as well as that of Litis contestatio, was considerably altered. It was partly narrowed: e.g. an absolution on the ground of Plus petitio, 4 § 53, or of a dilatory exception, 4 § 120, no longer grounded an exceptio rei judicatae: and it was partly extended: for instance it founded exceptio rei judicatae not only in respect of the principal question, but also in respect of incidental questions, whose decision was preliminary to that of the principal question, and in respect of any exceptions or replications. In view of these changes it is said that Res judicata, like Litis contestatio, while it retained its positive functions, lost its negative functions. But while it still generated an exceptio rei judicatae it seems difficult to say that it ceased to have a negative or consumptive operation: though this was attenuated, and made more rigorously subsidiary to the positive operation; and was henceforth left entirely to the discretion of the praetor.

The present seems to be the most convenient occasion that we shall find for gathering together in one conspectus the various operations and effects of Litis contestatio: fuller explanations of each will be found scattered over this treatise in connexion with the various matters to which such operations relate.

1. The principal operation was originally the processual con-

sumption of a right of action (litis consumptio) which has just been described: the barring of any subsequent suit in virtue of the maxim: De eadem re ne bis sit actio, Quintilian, 7, 6, 1, either by extinction (ipso jure) or by counteraction (ope exceptionis) of the plaintiff's right to sue. This occurred, as we shall see, 4 § 103, even when in consequence of process-prescription there was no judgment, or when, by reason of Plus petitio or some dilatory plea, there was a judgment against the plaintiff but not upon the merits. This operation was gradually abrogated before the time of Justinian, only leaving traces of itself in the Novatio necessaria, which extinguished indeed civilis obligatio but left a naturalis obligatio, sufficient to support the pignora or hypothecae by which the plaintiff was protected. Processual consumption had only considered the Intentio of the action that was brought: the exceptio rei judicatae, by which in later times the same or similar objects were accomplished, regarded the exact import of the Sententia.. The most signal departure from the principle of processual consumption was perhaps Justinian's constitution, Cod. 8, 41, 28, concerning Correality and Fidejussio, p. 398. As Correality is a single obligation imposed on several debtors, a suit against one extinguished the obligation of the remainder: e.g. a suit brought against a principal extinguished the right of suing the surety, and vice versa. Justinian enacted that the obligation of the remaining correal debtors should not be extinguished even by judgment against one, but only by perceptio, solutio, satisfactio, complete satisfaction of the plaintiff's claim.

2. (*a*) Litis contestatio, in the classical period, by interrupting Prescription, 4 § 110, saved the plaintiff's title from being barred by lapse of time. At a later period, Prescription was interrupted by a still earlier event, Insinuatio. As soon as Prescription of the right of action was interrupted, Prescription of pendency began to run, 4 § 103.

Moreover, respecting the plaintiff's Title or ground of action it is a general rule that no causa superveniens, or entitling event, subsequent to Litis contestatio can avail to save the plaintiff from losing the action already brought, though it may give him the right to bring another. Further, as a general rule, the ground of action must not only exist before Litis contestatio but must continue up to condemnatio. Otherwise in virtue of the maxim: Omnia judicia esse absolutoria, 4 § 114, the defendant will be absolved. E.g. if the defendant in an action of theft was a conditional

legatee of the thing which he has stolen from the heir who sues him for theft, and the condition is fulfilled after Litis contestatio, the defendant is acquitted, Dig. 13, 1, 14, pr.

(*b*) Litis contestatio made an exception to the latter rule in respect of the ancient institution of Usucapio; which though not interrupted by litis contestatio, did not entitle the defendant to absolution, as litis contestatio made it revocable, Dig. 6, 1, 18. Longi temporis praescriptio, like other forms of Prescription, was interrupted by litis contestatio, or, in later times, by Insinuatio: and from Cod. 7, 33, 10 and Cod. 7, 40, 2, this seems to have been the result when Justinian transformed longi temporis possessio into Usucapion. Savigny, however, § 261, and Vangerow, § 160, hold that then the rule of Prescription was in this respect superseded by the rule of Usucapion: that litis contestatio or insinuatio produced, that is to say, not interruption but liability to revocation.

(*c*) Litis contestatio produced another exception to the rule in the event of the destruction of the subject of litigation by casualty (casus). In Real actions if the defendant is a Mala fide possessor; in Personal actions if he is Morose (a debtor chargeable with mora) destruction of the subject, although ascribable to Casus, and notwithstanding the maxim: Impossibilium non est obligatio, does not save the defendant from condemnation. In the absence of Mala fides and Mora, casual destruction of the subject entitles the defendant, in virtue of the above maxim, to absolution. See p. 305.

(*d*) Litis contestatio makes transmissible a right of action which before was untransmissible. Vindictive actions (actiones vindictam spirantes), so long as there has been no litis contestatio, are incapable of active transmission; i.e. transmission to the heir of the plaintiff: and penal actions are incapable of passive transmission; i.e. transmission to the heir of the defendant. But when once litis contestatio has taken place, these actions, in the event of the subsequent death of the plaintiff or defendant, become capable respectively of active and passive transmission, 4 § 112.

(*e*) In an action on Tort when a man is only suable to the extent of his enrichment thereby, the question whether he is enriched or not is decided entirely by his circumstances at the moment of litis contestatio.

It was stated that as a general rule the plaintiff's title to judgment was required to be in existence before litis contestatio. This is subject to exception in respect of some of the subordinate elements

of title, certain minor conditions of judgment in his favour which agree in the common character that, in the formulary period, they were not expressed, as conditions of the judgment, in the intentio of the formula. E.g. in vindicatio the possession of the subject by the defendant, although it commences after litis contestatio, suffices to render him liable to be condemned. So in the actio de peculio, the existence of a peculium; in the actio mandati, the existence of moneys belonging to the principal in the hands of the agent; in the actio pigneraticia, the satisfaction of the debt by the mortgagor; all respectively conditions of a judgment in favour of the plaintiff, render the defendant liable to condemnatio even when they are events subsequent to the institution of the suit.

The same applies to certain exceptions: in the exceptio divisionis the question respecting the solvency of co-debtors, p. 402, and in the beneficium competentiae, the question respecting the means of the defendant, p. 350, is decided according to the circumstances in existence at the moment of condemnatio.

3. Litis contestatio has hitherto been considered in respect of its influence on the Conservation or Destruction of a ground of action. We proceed to its effect on the Amount of the condemnation.

(*a*) To save the plaintiff from being injured by the unavoidable duration of the suit, without, however, deterring the defendant from the defence of what he honestly believes to be his rights; a judgment against the defendant requires him to restore Omnis Causa, i.e. omne quod habiturus esset actor, si statim judicii accepti tempore res ei reddita fuisset, Dig. 6, 1, 20, all that the plaintiff would have had if the thing had been restored at the moment of litis contestatio. This implies the restitution of Fructus, all the gain of whatever nature that the defendant has derived from the fact of possession. If the object claimed is a sum of money, the defendant, notwithstanding the absence of mora, must pay Interest from the date of litis contestatio.

(*b*) After litis contestatio the defendant, the bona fide possessor as well as the mala fide possessor, the debtor free from mora as well as the debtor chargeable with mora, is liable for Culpa of every kind and degree, and responsible for the destruction and deterioration thereby occasioned. E.g. he is liable for neglected fruits (fructus percipiendi) as well as for fructus consumpti and fructus extantes, for the omission to collect the fruits is a piece of culpable supineness.

In hereditatis petitio effects *a* and *b* are made by Sc. Juventianum to date not from litis contestatio, but from a still earlier period, the moment of Insinuatio.

(*c*) Litis contestatio in actiones stricti juris fixes the moment to be regarded in the valuation of the plaintiff's interest in the subject of dispute (litis aestimatio). In bona fide actions this date is given by the moment of Condemnatio. See 4 § 51.

4. Litis contestatio affects the character of the Subject of litigation, which it converts into res Litigiosa, thereby rendering unlawful its alienation by the plaintiff or defendant. See 4 § 117.

DE OBLIGATIONIBUS QUAE EX DELICTO NASCUNTUR.

§ 182. Transeamus nunc ad obligationes quae ex delicto oriuntur, veluti si quis furtum fecerit, bona rapuerit, damnum dederit, iniuriam commiserit: quarum omnium rerum uno genere consi*st*it obligatio, cum ex contractu obligationes in IIII genera deducantur, sicut supra exposuimus.

§ 182. We proceed to obligations which originate in delict; theft, for instance, rapine, damage, or outrage; which are always Real, or incurred by some act or performance; whereas contractual obligations may be created in four different ways, as we have seen.

All actions are founded on the violation of some right, that is to say, on a wrong or delict. Even actions on contract are founded on a wrong, namely, on a breach of contract, and the plaintiff recovers not his primary right but a sanctioning right, in whatever measure it may be awarded. Delict (delictum, maleficium), however, is generally used in a more limited sense, to signify any wrong or unlawful act other than a breach of convention. Breach of contract is the violation of a jus in personam, or right available against a determinate person: delict in the narrower sense is a violation of a jus in rem, or right available against all the world. Jus in rem includes not only property and servitude but also rights of status, and what we have called primordial rights, e. g. the right to liberty, security, health, honour, reputation, for these rights can be maintained not against certain persons only but against all mankind.

Delicts or wrongs have a further division, into public and private. Public wrongs are called crimes, private wrongs are called trespasses, or torts, or civil injuries. Crimes have been defined to be such unlawful acts as are injurious in the first instance to the State; civil injuries, such as are harmful, principally or exclusively, to private individuals. But this definition is not satisfactory, because

all or most crimes are injurious to private individuals, and all or most civil injuries are harmful to the community. A better definition is the following: Crimes are those unlawful acts which create an obligation (liability to punishment) which can only be remitted by the State; Civil injuries are those unlawful acts which engender an obligation remissible by the private individual whose primary rights are violated.

The following may be taken as a natural classification of actions. Every right of action arises out of a delict, i. e. a violation of some positive or negative obligation.

(1) A violation of a positive obligation, that is, an obligation to perform, is a violation of a jus in personam, and founds an action for breach of contract, called an action ex contractu.

(2) A violation of a negative obligation, that is, an obligation to abstain, is a violation of a jus in rem, and either imposes an obligation remissible by the individual aggrieved, founding a civil action real or personal, and called in the latter case an action ex delicto;

(3) Or imposes an obligation remissible by the State but irremissible by the individual, founding a criminal prosecution.

Actions ex contractu seek to enforce both the rights immediately founded on a contract and those created by a party's subsequent unlawful intention (dolus) or carelessness (culpa) in relation to the contract.

Real actions and actions ex contractu imply that a defendant HAS something which he ought not to have: withholds from the plaintiff some thing or service of pecuniary value to which the plaintiff is entitled. They do not necessarily impute unlawful disposition (dolus or culpa) to the defendant. Actions ex delicto do not necessarily imply that the defendant HAS what he ought not to have; they necessarily impute unlawful disposition (dolus or culpa) to the defendant, § 211, and imply imputability, or responsibility for dolus and culpa.

In respect of contracts Culpa is distinguished as of different degrees; and sometimes a higher, sometimes a lower degree is capable of generating obligation. In respect of delicts Culpa is not distinguished by gradations; the least Culpa suffices to generate obligation.

All actions ex delicto are Penal, either bilaterally or unilaterally; that is, they tend, if not both to enrich the plaintiff and impoverish

the defendant (bilaterally penal), at least to impoverish the defendant without enriching the plaintiff (unilaterally penal), as, for example, suits for indemnification. Real actions and actions ex contractu are not Penal but Civil, Conservative, or Restorative; they maintain the fortunes of both parties at their original level; at the level destroyed or impeded by the defendant's wrong. We have before used the term Civil to distinguish the Private code from the Political code and the Criminal code. We here take it in a narrower sense to distinguish that part of the Private code which deals with Domestic relations and Dominion and Obligation ex contractu from that part which deals with Obligation ex delicto, which latter part may be called the Penal code. Penal jurisprudence forms a sort of intermediate between Civil jurisprudence, in this narrower sense, and Criminal jurisprudence.

DE FURTIS.

§ 183. Furtorum autem genera Servius Sulpicius et Masurius Sabinus IIII esse dixerunt, manifestum et nec manifestum, conceptum, et oblatum: Labeo duo, manifestum, nec manifestum; nam conceptum et oblatum species potius actionis esse furto cohaerentes quam genera furtorum; quod sane verius videtur, sicut inferius apparebit.

§ 183. Thefts are divided by Servius Sulpicius and Masurius Sabinus into four kinds, theft detected in the commission, simple theft, the possession of stolen goods discovered upon search, and the introduction of stolen goods. Labeo makes only two kinds, theft detected in the commission and simple theft, because the possession and introduction of stolen goods are not thefts, but actionable circumstances connected with theft; and this seems the better opinion, as will presently appear.

§ 184. Manifestum *fur*tum quidam id esse dixerunt quod *dum fit* deprehenditur. alii *vero* ulterius, quod eo loco deprehenditur ubi fit: velut si in oliveto olivarum, in vineto uvarum furtum factum est, quamdiu in eo oliveto aut vineto fur sit; aut si in domo furtum factum sit, quamdiu in ea domo fur sit. alii adhuc ulterius, *eousque* manifestum furtum esse dixerunt, donec perferret eo quo perferre fur destinasset. alii adhuc ulterius, quandoque eam rem fur tenens visus fuerit; quae sententia non optinuit.

§ 184. Theft detected in the commission is limited by some to detection in the act of taking; by others extended to detection while the thief is in the place where the theft is committed; for instance, if olives are stolen from an oliveyard, or grapes from a vineyard, while the thief is in the oliveyard or vineyard; or if a theft is committed in a house, while the thief is in the house. Others extend it to detection before the thief has carried the goods away to the place where he intends to deposit them;

sed et illorum sententia qui existimaverunt, donec perferret eo quo fur destinasset, deprehensum fur*tum manifestum esse*, *impro*bata *est*, *quod videba*tur a*l*iquam *admittere* dubitatione*m*, *unius* di*e*i a*n* etiam plurium dierum spatio id terminandum sit. quod eo pertinet, quia saepe in aliis civitatibus su*r*rept*as* res in alias civitates vel in alias provincias destinat fur perferre. ex duabus itaque superioribus opinionibus alterutra adprobatur: magis tamen plerique posteriorem proban*t*.

others to detection while the thief has the goods in his hands. The fourth opinion has not been adopted, and the third opinion that, until the thief has carried the stolen goods to their place of destination, he may be detected in the commission, is also impugned on the ground of the uncertainty whether one day or several is the limit of the time within which he must be detected; for a thief often intends to carry the goods he has stolen in one city into another city or province. The first and second opinions are commonly adopted, and more generally the second.

§ 185. Nec manifestum furtum quod sit, ex iis quae diximus intellegitur: nam quod manifestum non est, id nec manifestum est.

§ 185. Simple theft is theft not detected in the act.

§ 186. Conceptum furtum dicitur, cum aput aliquem testibus praesentibus furtiva res quaesita et inventa est: nam in eum propria actio constituta est, quamvis fur non sit, quae appellatur concepti.

§ 186. The discovery of stolen goods, when a person's premises are searched in the presence of witnesses, makes him liable, even though innocent of theft, to a special action for receiving stolen goods.

§ 187. Oblatum furtum dicitur, cum res furtiva tibi ab aliquo oblata sit, eaque aput te concepta sit; utique si ea mente data tibi fuerit, ut aput te potius quam *aput* eum qui dederit conciperetur. nam tibi, aput quem concepta est, propria adversus eum qui optulit, quamvis fur non sit, constituta est actio, *quae* appellatur obl*a*ti.

§ 187. To introduce stolen goods is to pass them off to a man, on whose premises they are discovered, with the intent that they should be discovered on his premises rather than on those of the introducer. The man on whose premises they are found may sue the passer off, though innocent of theft, in an action for the introduction of stolen goods.

§ 188. Est et*iam* prohibiti furti adversus eum qui furtum quaerere volentem prohibuerit.

§ 188. An action for prevention of search may be brought against the man who prevents the search of his premises where stolen goods are suspected to be concealed.

§ 189. Poena manifesti furti ex lege XII tabularum capitalis erat. nam liber verberatus addicebatur ei cui furtum fecerat; (utrum autem servus efficeretur ex addictione, an adiudicati loco constitueretur, ve-

§ 189. The punishment provided by the law of the Twelve Tables for theft detected in the commission was capital; a freeman was first scourged and then delivered, by judgment of the magistrate, to the

teres quaerebant); *servum aeque* verbera*tum e saxo deiciebant*. postea *im*probata est asperitas poenae, et tam ex servi persona quam ex liberi quadrupli actio Praetoris edicto constituta est.

person from whom he had stolen (whether made a slave by the delivery, or reduced to the condition of an insolvent judgment debtor, was an old question); a slave was first scourged and then flung from the Tarpeian rock. Later ages disapproved of the severity of this punishment, and theft, whether by a slave or by a freeman, was punished by the praetorian edict with fourfold damages.

§ 190. Nec manifesti furti poena per legem *XII* tabularum dupli inrogatur; quam etiam Praetor conservat.

§ 190. Simple theft is punished by the law of the Twelve Tables with double damages, which penalty the praetor has retained.

§ 191. Concepti et oblati poena ex lege XII tabularum tripli es*t*; qua*e* similiter a Praetore servatur.

§ 191. The possession and introduction of stolen goods are punished by the law of the Twelve Tables with triple damages, a penalty which the praetor has also adopted.

§ 192. Prohibiti actio quadrupli ex edicto Praetoris introducta *est*. lex autem eo nomine nullam poenam constituit: hoc solum praecepit, ut qui quaerere velit, n*u*dus quaerat, linteo cinctus, lancem habens; qui si quid invenerit, iubet id lex furtum manifestum esse.

§ 192. Prevention of search renders liable to fourfold damages, a penalty which the edict of the praetor first ordained. The Twelve Tables inflicted no penalty for such an offence, but directed that the subsequent searcher must be naked, only wearing a girdle, and carrying a platter in his hands, and made the ensuing discovery of stolen goods a detection of theft in the commission.

§ 193. Quid sit autem linteum, quaesitum est. se*d* verius *est* consuti genus esse, quo necessariae partes tegerent*ur*. quare lex tota ridicula est. nam qu*i* vestitum quaerere prohibet, is et nudum quaerere prohibit*ur*us est: eo magis quod ita quaesita res inventa maiori poenae subiciatur. deinde quod lancem sive ideo haberi iubeat, ut manibus occupantis nihil subiciatur, sive ideo, ut quod invenerit, ibi imponat: neutrum eorum procedit, si id quod *quae*ratur eius magnitudinis aut naturae sit, ut neque subici neque ib*i* *im*poni possit. certe non dubi-

§ 193. What the girdle was, is doubted, but it seems to have been a covering for the loins. The whole enactment of the Twelve Tables is nugatory, for he that prevents a man from searching in his clothes would prevent him from searching naked, especially as in such a search the finding of stolen goods would subject him to a heavier penalty. Besides, whether the platter is to be held by the searcher in order that his hands being engaged in holding it may not bring anything into the house, or in order that what is found may be placed

tatur, cuiuscumque materiae sit ea lanx, satis legi fieri.

thereupon, neither reason can be alleged when the thing searched for is of such a size or nature that it could not be brought into the house in the hand, nor placed on the platter. It is not disputed that a platter of any material satisfies the requirement of the Tables.

§ 194. Propter hoc tamen, quod lex ex ea causa manifestum furtum esse iubet, sunt qui scribunt furtum manifestum aut lege aut natura *intellegi:* lege id ipsum de quo loquimur; natura illud de quo superius exposuimus. sed verius est natura tantum manifestum furtum intellegi. neque enim lex facere potest, ut qui manifestus fur non si*t*, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter aut homicida non si*t*, adulter vel homicida sit: at illu*d* sane lex facere potest, ut perinde aliquis poena teneatur atqu*e* si furtum vel adulterium vel homicidium admi*s*isset, quamvis nihil eorum admiserit.

§ 194. On account of the enactment that a discovery in such a search is a detection of theft in the commission, some writers say that detection in the commission is of two kinds, legal and natural: legal detection being detection in such a search; natural detection, detection as recently defined. But in truth, the natural mode of detection in the commission is the only one that we can allow, for law cannot turn a thief not detected in the act into a thief detected in the act, any more than it can turn a man who is not a thief into a thief; or make an adulterer or homicide out of a man who has not killed or committed adultery. What law can accomplish is this, that a person shall be subject to a penalty just as if he had committed theft, adultery, or homicide, although he have not committed any of those offences.

§ 195. Furtum autem fit non solum cum quis intercipiendi causa rem alienam amovet, *sed* generaliter cum qui rem alienam invito domino contrectat.

§ 195. Theft is not confined to the carrying away the property of another with intent of appropriation, but embraces all corporal dealing with the property of another against the will of the owner.

§ 196. Itaque si quis re quae aput eum deposita sit utatur, furtum committit. et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur. veluti si quis argentum utendum acceperit, *quod* quasi amicos ad cenam invitaturus rogaverit, et id peregre secum tulerit, aut si quis e*qu*um gestandi gratia commodatum longius *s*ecum aliquo duxerit; quod veteres

§ 196. Thus, to use a thing committed to one's keeping as a deposit, or to put a thing that is lent for use to a different use than that for which it was lent, is theft; to borrow plate, for instance, on the representation that the borrower is going to entertain his friends, and then to carry it away into the country; or to borrow a horse for a drive, and then to take it out of

scripserunt de eo qui in aciem perduxisset.

the neighbourhood; or, like the man in the old case, to take it into battle.

§ 197. Placuit tamen eos qui *re*bus commodatis aliter uterentur quam utendas accepissent, ita furtum committere, si intellegant id se invito domino facere, eumque, si intellexisse*t*, non permissurum; et si permissurum crederent, extra furti crimen videri: optima sane distinctione, quia furtum sine dolo malo non committitur.

§ 197. It is held, however, that putting a thing lent for use to a different use than the lender contemplated is only theft if the borrower knows it to be contrary to the will of the owner, and that, if he had notice, he would refuse permission; but if he believes that the owner would give permission, it is not theft; and the distinction is just, for there is no theft without unlawful intention.

§ 198. Se*d* *et* si credat aliquis invito domino se rem *con*trectare, domino autem volente id fiat, dicitur furtum non fieri. unde illu*d* quaesitum est, cum Titius servum meum *s*ollici*t*ar*it*, ut quasdam res mihi subriperet et ad eum perferret, *et servus* id ad me pertul*er*it, ego, *d*um volo Titium in ipso delicto deprehendere, permiser*im* *servo* quasdam res ad eum perfe*rr*e, utrum furti, an servi corrupti iudici*o* teneatur Titius mihi, an neutro: responsum, neutro eum teneri, furti ideo quod non invito me res contrectar*it*, servi corrupti ideo quod deterior servus factus non est.

§ 198. To deal with a thing in the belief that you are acting against the will of the owner, whereas the owner is consenting, is said not to be theft; whence a question arises, if Titius solicits my slave to steal my property, and convey it to him, and my slave informs me of it, and I, wishing to detect Titius in flagrante delicto, permit my slave to convey my goods to him; can an action of theft or for corrupting a slave be maintained against Titius? It has been held that neither action is maintainable; not theft, because I consented to his dealing with my property; not corrupting a slave, because the slave resisted the solicitation.

§ 199. Interdum autem etiam liberorum hominum furtum fit, velut si quis liberorum nostrorum qui in potestate nostra sunt, sive etiam uxor quae in manu nostra sit, sive etiam iudicatus vel auctoratus meus subreptus *f*uer*it*.

§ 199. A freeman may be the subject of a theft; for instance, a child in my power, a wife in my hand, my insolvent debtor, or my hired gladiator, if secretly removed from my control.

§ 200. Aliquando etiam *su*ae rei quisque furtum committit, veluti si debitor rem quam credito*r*i pignori dedit subtraxerit, vel si bonae fidei possessori rem meam possidenti subripuerim. unde placuit eum qui ser*v*um suum quem alius bona fide possidebat ad se reversum celaverit furtum committere.

§ 200. A man sometimes steals his own property; for instance, a debtor who purloins the goods which he has pledged to a creditor, or a proprietor who steals his property from a bona fide possessor; and accordingly it has been held, that concealment of one's slave, who, being possessed in good faith by another had returned to his owner, amounted to theft.

§ 201. Rursus ex diverso interdum *rem* alienam occupare et usucapere concessum est, nec creditur furtum fieri, velut res hereditarias quarum *non prius* nactus possessionem necessarius heres esset; n*am* necessario herede extante placuit, ut pro herede usucapi possit. d*ebit*or *quoque* qu*i* fid*uciam quam* cr*edit*or*i* mancipaverit aut in i*u*re cesserit d*etinet*, *ut* superiore commentario rettulimus, sine furto possidere et usucapere potest.

§ 201. Conversely, property belonging to another may be seized and converted by usucapion without committing theft; hereditaments, for instance, before a necessary successor has obtained possession; for even where there is a necessary successor the first occupant may acquire by usucapion as quasi successor (2 § 58). Also a mortgagor, having detention of property mortgaged by mancipation or surrender in court, as I mentioned in the preceding book, may, without committing theft, repossess it and acquire new ownership thereof by usucapion.

§ 202. Interdum furti tenetur *qui* ipse furtum non fecerit: qualis est cuius ope consilio furtum factum est. in quo numero est qui nummos tibi excussit, ut eos alius surriperet, vel opstitit tibi, ut alius surriperet, aut o*v*es aut boves tuas fugavit, ut alius eas exciperet; et hoc veteres scripserunt de eo qui panno rubro fugavit armentum. Sed si qui*d* per lasciviam, et non data opera, ut furtum committeretur, factum sit, videbimus an utilis *Aquiliae actio* dari debeat, cum per legem Aquiliam quae de damno lata *est* etiam culpa puniatur.

§ 202. Theft may be chargeable on a person who is not the perpetrator, on him, namely, by whose aid and abetment a theft is committed; to which class belongs the man who knocks out of your hand money for another to pick up, or stands in your way that another may snatch it, or scatters your sheep or oxen that another may steal them, like the man in the old books, who waved a red cloth to frighten a herd. If the same thing were done as a frolic, without the intention of assisting a theft, a modified or praetorian form of Aquilian action may be maintainable, for the Aquilian law relating to damage makes even carelessness penal.

§ 203. Furti autem a*ctio* ei co*m*petit cuius interest rem salvam esse, licet dominus non sit: itaque nec domino aliter co*m*petit, quam si *eius* in*ter*sit rem non perire.

§ 203. The action of theft is maintainable by the person interested in the preservation of the property, who need not be the owner; and even the owner cannot maintain it unless he suffers detriment from the loss.

§ 204. Unde constat creditorem de pignore subrepto furti agere posse; adeo quidem, ut quamvis ipse dominus, id est ipse debitor, eam rem subripuerit, nihilominus creditori co*m*petat actio furti.

§ 204. Hence when a pawn is stolen, the pawnee can sue, and even the owner or pawnor who steals a pawn is suable for theft by the pawnee.

§ 205. Item si fullo polienda

§ 205. So if clothes are delivered

curandave, aut sarcinator sarcienda vestimenta mercede certa acceperit, eaque furto amiserit, ipse furti habet actionem, non dominus; quia domini nihil *interest ea* non perisse, cum iudicio locati a fullone aut sarcinatore suum *per*sequi poss*it*, si modo is fullo aut sarci*na*tor *ad* rem praestandam sufficiat; nam si solvendo non est, tunc quia ab eo do*minus suu*m consequi non potest, ipsi furti actio co*m*petit, quia hoc casu ipsius interest rem salvam esse.

to be cleaned or finished or mended for a certain remuneration, and then are stolen, the fuller or tailor has the action, and not the owner; for the owner is not prejudiced by the loss, having his action of letting against the bailee to recover the value; supposing always, that the bailee is able to make the loss good. If the bailee is insolvent, the owner cannot recover out of him, and can maintain an action against the thief; being, in this hypothesis, interested in the loss of the property.

§ 206. Quae de fullone aut sarci*na*tore diximus, eadem transferemus et ad eum cui rem commodavimus: nam ut illi mercedem capiendo custodiam praestant, ita hic quoque utend*i* commodum percipiendo similiter necesse habet custodiam praestare.

§ 206. What has been said of the fuller and tailor applies to the borrower; for, as the remuneration they receive makes them responsible for custody, so the advantage the borrower derives from the use of an article requires him to keep it safely at his peril.

§ 207. Sed is aput quem res deposita est custodiam non praestat, tantumque in eo obnoxius est, si quid ipse dolo fecerit: qua de *causa*, *si* res ei subrepta fuerit quae restituenda est, eius nomine depositi non *t*enetur, nec ob id eius interest rem salvam esse: furti itaque agere non potest; *sed* ea actio domino co*m*petit.

§ 207. As a depositary is not answerable for the safe-keeping of the thing deposited, but only for fraud, and, if it is stolen, is not compellable to make restitution by action of deposit, he is not interested in its loss; and therefore the action of theft is only maintainable by the depositor.

§ 208. In summa sciendum est qua*e*situm esse, an impubes rem alienam *am*ovendo furtum faciat. plerisque placet, quia furtum ex ad*f*ectu consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, et ob id intellegat se delinquere.

§ 208. Finally, it is a question whether a child below the age of puberty, who carries away the property of another, commits a theft; and most agree that as theft depends on intention, obligation by theft is not incurred unless the child, being near to puberty, understands its delinquency.

Theft in modern systems of jurisprudence is a crime, that is, belongs to the penal or criminal code. In Roman law, as in other early systems, it is a private injury, and treated as a subject of the civil code. This was confirmed by the law of the Twelve Tables, which allowed a compromise or composition for theft, that is, allowed the obligation (liability to the legal sanction) thereby

engendered to be extinguished by private convention between the party wronged, and the wrongdoer, Dig. 2, 14; 7, 14.

§ 184. Aulus Gellius gives a fragment of Sabinus which combines the first and third definition of furtum manifestum. **Manifestum autem furtum est, ut ait Masurius, quod deprehenditur dum fit. Faciendi finis est, cum perlatum est quo ferri coeperat, 9, 18, 1.** 'Manifest theft is that which is detected in the act. The act is finished when the removal of the goods to the place intended is completed.' Justinian confirms the third definition, Inst. 4, 1, 3.

§ 189. The reason why furtum manifestum was subjected to a heavier penalty than furtum nec manifestum was not because the barbarous legislator supposed that detection in the act was an aggravation of the offence, but because he wished, by the amplitude of the legal remedy offered, to induce the aggrieved party not to take the law into his own hands and inflict summary vengeance on the offender, particularly as it was lawful to kill a nocturnal thief, or one who during the day defended himself with a weapon. In the infancy of society it is an important object to the legislator to induce an injured person to have recourse to the public tribunals instead of righting himself, that is to say, constituting himself both lawgiver and judge.

That such was really the motive of the legislator we have historic evidence in the declaration of Rothari, ruler of the Langobards, A.D. 643. He gives the relatives of the slain their election between the primitive vengeance for blood (feud or vendetta), and a composition or pecuniary fine (wergeld or poena) to be recovered by action before the public tribunals. He says that he fixes a high fine in order to induce plaintiffs to forego their right of feud; and implies that he would gladly have abolished the right of feud or private war, but felt that it was too deeply rooted in the habits of his tribe to be extirpated by legislation. Bethmann-Hollweg, § 60.

This writer supposes, § 96, that the praetorian action Furti manifesti had a Fictitious formula, 4 § 32, and suggests the following:

Demonstratio: Quod Numerius Negidius Aulo Agerio furtum manifestum fecit paterae aureae,

Fictio: Si ob eam rem Numerium Negidium ex lege verberari itemque Aulo Agerio addici oporteret,

Condemnatio: Quanti ea res fuit, tantae pecuniae, judex, Numerium Negidium Aulo Agerio quadruplum condemnato: Si non paret, absolvito.

§ 193. We must distinguish between furtum conceptum and furtum lance et licio conceptum. Ea quoque furta quae per lancem liciumque concepta essent, proinde ac si manifesta forent, vindicaverunt, Gellius, 11, 18, 9. 'Possession of stolen goods discovered on search with the platter and girdle was punished as theft detected in the act.'

Traces of the word 'conceptum' occur in a fragment of the Twelve Tables: Tignum junctum aedibus vineaeque et concapet ne solvito, 'Timber built into a house or vineyard of another man and discovered there by the owner must not be severed:' where et concapet represents either et conceptum or qui concipiet.

The search with a platter and girdle was probably a custom derived from Greece, for a similar formality is described by Plato, Leges, 12, 7.

In the later period of Roman law, as in modern Europe, the search for stolen goods was not conducted by the private party but by public officers. In England the object is effected by a search warrant. Upon the information on oath that a party has probable cause to suspect that his goods have been stolen, and are concealed in a certain dwelling-house, and on his shewing the cause of his suspicion, a justice of the peace may grant a warrant authorizing to enter and search for the said goods, and to attach the goods and the party in whose custody they are found, and bring them before him, that he may give an account how he came by them, and be dealt with according to law. The warrant is directed to a constable or other public officer and not to any private person, though it is proper that the party complaining should be present and assistant because he knows his goods. As touching the party that had custody of the goods, if they were stolen, but not by him but by another that sold and delivered them to him (furtum oblatum), if it appear that he was ignorant that they were stolen, he may be discharged as an offender and bound over to give evidence as a witness against him that sold them.

§ 195. The same definition of theft is given by Paulus. Fur est qui dolo malo rem alienam contrectat, Sent. R. 2, 31, 1. 'A thief is he who with evil intention handles (lifts, moves, touches,) the property of another.' Justinian gives a different definition. Furtum est contrectatio rei fraudulosa, lucri faciendi causa vel ipsius rei, vel etiam usus ejus possessionisve, Inst. 4, 1, 1. 'Theft

is handling a thing with fraudulent intention to appropriate the property, use, or possession.'

It may be observed that Justinian does not say with Paulus, rei alienae, because a man may steal his own property, as when a pawnor steals from a pawnee or a proprietor from a usufructuary. So, by English law, to take a man's own goods out of the hands of a bailee, if the taking have the effect of charging the bailee, is larceny. The usus of a thing is stolen when the proprietor steals from the usufructuary, or when a pawnee unlawfully uses a pawn. Si creditor pignore utatur, furtum committit, Inst. 4, 1, 6.

Possessio is appropriated when a pawn is stolen by the pawnor, or when the depositary uses a deposit, or the borrower puts the thing borrowed to an unauthorized use. In Roman law the depositary and borrower, unlike the pawnee, have not possession but merely detention (see 4 § 153), and the same unlawful act (contrectatio) which amounts to theft converts their detention into possession.

In English law larceny is defined to be the unlawful taking and carrying away of things personal with intent to deprive the right owner of the same and to make them the property of the taker. To constitute larceny the original taking of possession must be unlawful: therefore, if the owner deliver his property to a person in trust, the subsequent conversion by the bailee, though an offence and a breach of faith, is not larceny, because the original taking was lawful. There are, however, two exceptions to this rule which deserve notice. It is larceny if the delivery was obtained by fraud, i. e. with an original design and pre-arranged plan to deprive the owner of his property and convert it to the use of the taker. The possession is then unlawful in its inception. Again, if delivery does not divest the owner of the legal possession, conversion by the taker is larceny. In this respect a servant (e. g. a shepherd, carter, porter, butler, clerk,) is to be distinguished from a bailee, for the servant is regarded as not possessing, but merely the instrument of the owner's possession.

As far as Roman law is concerned this principle would make the bailee, as well as the servant, capable of larceny, for in Roman law the bailee (except in the case of pignus) has not possession, but merely detention. The fact, however, that the pawnee, who has lawful possession, is guilty of theft if he make use of the pawn,

shows that in Roman law an unlawful inception of possession is not an essential element in the definition of furtum.

§ 198. Justinian decided that the attempt to corrupt a slave was as criminal as his actual corruption, and made the offender liable to be sued both for theft and for corrupting a slave, Inst. 4, 1, 8.

§ 201. Usucapion of the property of a necessary successor, and usureceptio, or usucapion of the property of a mortgagee, have been mentioned in the preceding book. See 2 §§ 52–60.

§ 202. A person who is present aiding and abetting when an offence is committed but is not the actual perpetrator is called, in English law, a principal in the second degree. He who procures or abets another to commit an offence but is absent at the time of the commission is called an accessary before the fact. Their punishment is usually the same as that of the principal in the first degree. An accessary after the fact is one who, knowing an offence to have been committed by another, receives, harbours, or assists the offender.

§ 203. When a sale is complete, property does not, by Roman law, pass to the vendee before delivery, although the thing sold is forthwith at the risks of the vendee. If it is stolen before delivery, in spite of the rule that the action of theft is maintainable by the person interested, the vendee cannot sue in his own name, but the vendor is compellable to cede his actions and the vendee sues in the name of the vendor, Dig. 47, 2, 14, 1. From this we may infer the rule that to maintain the action of theft, besides interest in the loss, a plaintiff must have had either property or detention, both of which are wanting to the vendee in the case supposed.

The quadruple and double damages for furtum manifestum and nec manifestum were purely penal. The owner could further recover restitution of thing stolen by a real action (vindicatio) or its equivalent in a personal action (condictio furtiva), Inst. 4, 1, 20. The granting of a personal action in this case, with an intentio declaring that the thief was bound to convey the property (dare oportere), was anomalous, because the property of thing stolen was not in the thief but in the owner.

If the thing stolen had been destroyed, or if, being money, it had been spent or mixed with money of the thief, the property of the plaintiff would have been extinguished and condictio would be a suitable action. If the property existed in the hands of the

thief vindicatio was the proper action. The object of the legislator in allowing the plaintiff in any case to sue by condictio was to relieve him from the necessity of ascertaining whether his property was safe or had been consumed. If we ask why, instead of using the intentio, Si paret dare oportere, 4 § 4, which might be inconsistent with the truth, the plaintiff did not use the formula, Quidquid paret dare facere oportere, which, as including compensation or simple restitution of possession, would always be consistent with truth; the answer is probably what Savigny has suggested, namely, the intention of the legislator to subject the defendant to the sponsio poenalis, the additional forfeiture of a third of the sum in litigation. It is true that this is only mentioned as incidental to a condictio for pecunia certa credita, 4 § 171, but the penalty may have also been recoverable in a claim for certain money stolen (condictio furtiva).

Bethmann-Hollweg, § 95, proposes the following formula for the actio furti nec manifesti:

Demonstratio: Quod Numerius Negidius Aulo Agerio furtum fecit paterae aureae,

Intentio: Si paret ob eam rem Numerium Negidium Aulo Agerio pro fure damnum decidere oportere (4 § 37),

Condemnatio: Quanti paret eam rem fuisse, tantae pecuniae duplum, judex, Numerium Negidium Aulo Agerio condemna: Si non paret, absolve.

The plaintiff in theft had the option of proceeding by civil action or by criminal prosecution, and Ulpian informs us that the latter was the usual course, Dig. 47, 2, 94.

DE VI BONORUM RAPTORUM.

§ 209. Qui res alienas rapit tenetur etiam furti: quis enim magis alienam rem invito domino *con*trectat quam qui rapit? itaque rect*e* *dict*um est eum improbum furem esse. se*d* propriam actionem eius *de*licti nom*ine* Praetor introduxit, quae appellatur vi bonorum raptorum; et est intra annum quadrupli actio, post annum simpli. quae actio utilis est, et si quis unam rem, licet minimam, rapuerit.

§ 209. Rapine or robbery is chargeable as theft, for who more handles the property of another against the will of the owner than the robber? who has been well denominated an audacious thief. However, as a special remedy for this offence the praetor has introduced the action for rapine with violence; which may be brought within a year for four times the value, after a year for simple damages; and which lies when only a single thing of the slightest value has been taken with violence.

The party aggrieved might either proceed by civil action or by criminal prosecution under the lex Julia de vi publica et privata. This law, enacted either by Augustus or by Julius Caesar, made the criminal guilty of public or armed violence, liable to deportation; the criminal guilty of private or unarmed violence, to confiscation of a third of his goods, Inst. 4, 18, 8.

The quadruple damages in the civil action of rapine were not purely penal as in the action of furtum manifestum, but included the restitution of the property or its value. The penal damages for rapine were therefore only three times the value of the goods plundered, that is, less than the damages in furtum manifestum. If, however, the robber was taken in the act, he was chargeable, as Gaius explains, with furtum manifestum.

The lex Cornelia repetundarum passed by the dictator Sylla, B.C. 81, instituting a criminal action against governors of provinces guilty of extortion: the formula Octaviana or actio quod Metus causa, introduced by the praetor Octavius, father of Augustus, B.C. 79: and the actio Vi bonorum raptorum, introduced by the praetor Lucullus, B.C. 77, all fall within the space of four years and indicate the lawlessness generated by the civil wars in the time of Sylla.

Robbery, like theft, requires dolus malus, that is, criminal intention. If then a man, believing himself to be rightful owner, violently invaded lands or violently seized movable goods, he was not guilty of robbery; but, by a constitution of the emperors Valentinian, Theodosius, and Arcadius, enacted A.D. 389, in order to repress violence, and deter people from taking the law into their own hands, the offender, if rightful owner, forfeited the property to the person dispossessed; if not rightful owner, was condemned, besides restitution of possession, to forfeit the value of the property, Cod. 8, 4, 7. This constitution increased the civil penalty recoverable for violent dispossession by the interdict unde vi, 4 § 154. By the interdict unde vi no penalty was originally recoverable for violent, but unarmed, dispossession of one whose own possession was tainted by an origin, violent, clandestine, or permissive: and for either armed or unarmed dispossession the penalty, as far as the property in question was concerned, was only restitution of possession. By the constitution of the three emperors the civil penalty of all violent disseisin was loss not only of possession but of property; and subsequently to this constitution the interdict unde vi ceased to make a distinction between armed and unarmed dispossession.

This constitution may be regarded as the final blow struck by the Roman legislator at the archaic form of remedial procedure—private violence or self-redress. In archaic society, if society it could be called, before the establishment of central authority, public tribunals, and police or executive functionaries, such was the only possible means of redress; and such redress was recognized and permitted by primeval law, if the sentiments of the tribe at such a period can be called by the name of law.

Among the German races the disorder implied by the toleration of Feud or private war was gradually mitigated by the introduction of certain Truces, or temporary or local Peaces: the Truce of the King, prohibiting private war within the precincts of the royal residence: the Truce of the Church, giving to the fugitive wrong-doer an asylum in the sanctuary: the Truce of the Assembly, excluding the prosecution of feuds from the place where the Hundred was assembled: and the Truce of the Town, Village, or House, protecting the offender from homicidal attack within these limits.

At some period, too, society interposed and offered to act as arbitrator, and to procure for the aggrieved party satisfaction of the wrong he had endured. Accordingly all injuries were rated at a certain tariff, and a person who had suffered aggression had the option whether he should avenge himself or, in commutation of his right of Feud, accept the fine fixed by this tariff, and awarded by a tribunal of his countrymen. This mediation of the community, which the plaintiff could accept or decline at his discretion, was the origin of actiones poenales, the poena being the inducement offered to the plaintiff to make him adopt the more peaceful course. In Saxon law the alternative offered to the aggressor was expressed by the maxim Biege spere of side other bere: 'Buy the spear off the side or bear it:' i. e. make atonement or be liable to Feud. (Kemble).

Finally the Peace of the King, proclaimed at each coronation, became universal: the state undertook the decision and composition of all quarrels; and private war at all times and in all places was interdicted and superseded by recourse to the public judicature.

DE LEGE AQUILIA.

§ 210. Damni iniuriae actio constituitur per legem Aquiliam. cuius primo capite cautum est, *ut* si quis hominem alienum, eamve quadru-

§ 210. Damage unlawfully caused is actionable under the lex Aquilia, whose first chapter provides, that if a slave of another man, or a

pedem quae pecudum numero sit, iniuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur.

quadruped of his cattle, be unlawfully slain, whatever within a year was the highest value thereof, that amount the offender shall pay to the owner.

§ 211. Is iniuria autem occidere intellegitur cuius dolo aut culpa id acciderit, nec ulla alia lege damnum quod sine iniuria datur reprehenditur: itaque inpunitus est qui sine culpa et dolo malo casu quodam damnum committit.

§ 211. Unlawful slaying means slaying by intention or negligence; for it is only disobedience to law that is punished, and in the absence of intention and negligence there is no penalty for fortuitous damage.

§ 212. Nec solum corpus in actione huius legis aestimatur; sed sane si servo occiso plus dominus capiat damni quam pretium servi sit, id quoque aestimatur: velut si servus meus ab aliquo heres institutus, ante quam iussu meo hereditatem cerneret, occisus fuerit; non enim tantum ipsius pretium aestimatur, sed et hereditatis amissae quantitas. item si ex gemellis vel ex comoedis vel ex symphoniacis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius quoque computatur quod ceteri qui supersunt depretiati sunt. idem iuris est etiam si ex pari mularum unam, vel etiam ex quadrigis equorum unum occiderit.

§ 212. It is not only the body of the slave or animal slain that is appraised, but if the death of a slave occasion to the owner the loss of anything in addition to his price, this loss is further estimated; for instance, if my slave has been instituted somebody's heir, and before by my order he has signified his acceptance, he is slain, valuation is made not only of his body but also of the inheritance I have missed; or if one of two twins, or one of a company of players, or one of a band of musicians is slain, an estimate is made not only of his value but also of the extent to which the remainder are depreciated. The same holds if one of a pair of mules, or one of four chariot horses is killed.

§ 213. Cuius autem servus occisus est, is liberum arbitrium habet vel capitali crimine reum facere eum qui occiderit, vel hac lege damnum persequi.

§ 213. The owner whose slave is killed has the option of accusing the homicide of a capital crime or of suing him under this law for damages.

§ 214. Quod autem adiectum est in hac lege: QUANTI IN EO ANNO PLURIMI EA RES FUERIT, illud efficit, si clodum puta aut luscum servum occiderit, qui in eo anno integer fuerit, *ut non quanti mortis tempore, sed quanti in eo anno plurimi fuerit*, aestimatio fiat. quo fit, ut quis plus interdum consequatur quam ei damnum datum est.

§ 214. From the words of this law, 'Whatever within a year was the highest value thereof,' it follows that if a slave was lame or blind of one eye when he was slain, but had been sound within a year, as it is not his value at the time of his death but his highest value within a year that is appraised, a plaintiff will sometimes recover more than the amount of the loss he has sustained.

§ 215. Capite secundo *in* adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res es*t*, ta*n*ti actio constituitur.

§ 215. By the second chapter an adstipulator who defrauds a principal covenantee by releasing the covenantor can be sued for the amount of the loss occasioned.

§ 216. Qu*a* et ipsa parte legis damni nomine actionem introduci manifestum est. sed id caveri non fuit necessarium, cum actio mandati ad eam rem sufficeret; nisi quod ea lege adversus infitiantem in duplum agitur.

§ 216. In this chapter, as well as in the others, damage is made a ground of action, though here the provision was unnecessary, because the action of Agency would give a sufficient remedy, except that the lex Aquilia, when the facts are traversed, gives double damages.

§ 217. Capite tertio de omni cetero damno cavetur. itaque si quis servum vel eam quadrupedem quae pecudum numero *est vulneraverit, sive eam quadrupedem quae pecudum numero non est*, velut canem, aut feram bestiam vel*ut* ursum leonem vulneraverit vel occiderit, ex hoc capite actio constituitur. in ceteris quoque animalibus, item in omnibus rebus qua*e* anima carent, damnum iniuria datum hac parte vindicatur. si quid enim ustum aut ruptum aut fractum *fuerit*, actio hoc capite constituitur; quamquam potuerit sola rupti appellatio in omnes istas causas sufficere: ruptum *enim intellegitur quod quoquo modo corruptum* est. unde non so*lum usta aut* rupta aut fracta, se*d* et*iam* scissa et *c*ollisa et effusa et *diruta* aut perempta atque deteriora facta hoc verbo continentur.

§ 217. The third chapter makes provision for all other damage. Therefore if a slave, or a quadruped included under the name of cattle, is wounded, or if a quadruped not included under the name of cattle, as a dog, or a wild beast, a bear or lion, is wounded or is killed, in this chapter an action is provided: or if other animals or things inanimate are unlawfully damaged, this chapter imposes a penalty, for all burning, breaking, crushing, is herein made actionable: and indeed the single word 'breaking' covers all these offences, for breaking denotes every kind of injury; and not only burning, breaking, crushing, but any cutting, bruising, spilling, demolishing, destroying, or deteriorating, is hereby denominated.

§ 218. Hoc tamen capite non quanti in eo anno, sed quanti in diebus XXX proxumis ea res fuerit, damnatur is qui damnum dederit; ac ne PLURIMI quidem verbum adicitur: et ideo quidam *diversae scholae auctores* putaverunt liberum esse ius *datum, ut duntaxat* de *XXX* diebus *proxumis vel eum Praetor formulae* adiceret *quo* plurimi res fuit, vel a*lium* quo minoris fuit. sed Sabino placuit perinde habendum ac s*i* et*iam* hac parte PLURIMI verbum adiectum esset: nam legis

§ 218. In this chapter it is not the value which the thing had within a year, but which it had within the last thirty days, that is chargeable on the author of the mischief, and it is not expressly the highest value. Hence some of the other school have held that it was left to the discretion of the praetor (judex?) whether the damages should be measured by the highest value or by any lower value which the thing may have had within the last thirty days: but Sabinus held

latorem contentum fuisse, *quod prima parte eo verbo usus esset.*

that the law must be interpreted as if it contained the word 'highest,' the legislator having thought it sufficient to use this word in the first chapter.

§ 219. Et placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit. *ita*que alio modo damno dato utiles actiones dantur: velut si quis alienum hominem *aut* pecudem incluserit et fame necaverit, aut iumentum tam vehementer egerit, ut rumperetur; *aut* si quis alieno servo persuaserit, ut in arborem ascenderet vel in puteum descenderet, et *is* ascendendo aut descendendo ceciderit, *et* aut mortuus fuerit aut aliqua parte corporis laesus sit. item si quis alienum servum de ponte *aut* ripa in flumen proiecerit et is suffocatus fuerit *tum* hic corpore suo damnum dedisse eo quod proiecerit, non difficiliter intellegi potest.

§ 219. It is held that an action under this statute only lies when the body of the offender is the instrument of mischief; for any other mode of occasioning loss a modified action must be brought: for instance, if a slave or quadruped is shut up and starved to death, or a horse is foundered by hard driving, or a slave is persuaded to climb a tree or descend a well, and in climbing or descending falls and is killed or hurt. But if a slave is pushed off a bridge or bank into a river and there drowned, the body of the person who pushed him may fairly be held to have caused his death.

§ 210. The lex Aquilia was a plebiscite carried by a tribune called Aquilius, according to Theophilus, at one of the secessions of the plebs, probably at the secession to the Janiculum, B.C. 285, on which same occasion the lex Hortensia was carried, making the plebiscites binding on the patricians.

The words of the first clause are preserved in the Digest: Qui servum servamve alienum alienamve, quadrupedemve pecudem injuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto, Dig. 9, 2, 2. 'If a slave, male or female, of another person, or a quadruped of his cattle is unlawfully slain, whatever was the highest value it bore in the previous year, such sum shall be due as a judgment debt from the slayer to the owner.' Cattle are animals that feed in flocks or herds, and include horses, mules, asses, oxen, sheep, goats, and swine, 4 § 171.

§ 212. The words Quanti ea res est, erit, or fuit occur in the condemnatio or last part of a formula when a defendant is bound to indemnify a plaintiff, that is, to pay him a certain value. These words have two meanings: they mean either (1) the value of a thing to the world in general, i.e. its selling value or market value, called verum rei pretium, or vera rei aestimatio; or (2) its

value to this particular plaintiff, id quod interest actoris, or utilitas actoris; a value which might be either less or greater than the market value.

Where a claim is founded on a contract, say a contract of insurance against some kind of loss, the market value of the thing lost is intended; and the loss of the plaintiff does not include the damages he has indirectly experienced (damnum indirectum) nor the gain he has failed to realize (lucrum cessans). When a claim of indemnification is founded on delict or on dolus or culpa (dolose or culpose breach of contract), the plaintiff's interest is the measure of the indemnity to be paid, and includes not only the immediate damage that he has suffered, but also the mediate, when it was certain and capable of being foreseen; and not only the positive loss which he has suffered but also the gain which he has been hindered from realizing. If a creditor has been kept out of a sum of money, he will at least be entitled to the current rate of interest: but this is not the limit of his claim, if he can prove that the current rate of interest is insufficient to cover the specific disadvantage he has suffered from the Mora of his debtor.

The plaintiff's interest is the measure of the damages he recovers by the Interdicts Uti possidetis, Utrubi, and Unde vi; as it is in all actions founded on delinquency. The actio vi bonorum raptorum, however, is an exception to the rule. Here, in consequence, probably, of the peculiar wording of the edict, the measure of damages, the simplum or unit to be quadrupled, is not the plaintiff's interest but the market value, Dig. 47, 8, 2, 13, Savigny, System, Appendix 12.

Instances of indirect damages due to the act or omission of a defendant, are: the depreciation of the remaining horses of a team when one has been killed: the penal sum which a plaintiff is liable to pay from inability to fulfil another engagement in consequence of the default of the defendant: the sale of goods mortgaged by the plaintiff as security for another engagement which he cannot fulfil in consequence of the default of the defendant: the downfall of a house in consequence of the rottenness of the timber supplied by the defendant: the infection and extermination of a whole herd of cattle in consequence of a diseased beast being sold by the defendant.

Although in respect of computation claims of indemnity founded on breach of contract, whether dolose or culpose, stand on the same footing as claims founded on delict; yet an important distinction was introduced by Justinian, who enacted that in the former case

the damages recoverable by this computation of lucrum cessans and damnum indirectum should not exceed the double of the immediate value, hoc quod interest dupli quantitatem minime excedere, Cod. 7, 47; but left claims founded on delict without any similar limitation. In claims founded on breach of contract we may distinguish two obligations: the primary obligation as defined by the promise of the contractor, and what we have called, p. 357, the secondary or sanctioning obligation produced by the non-fulfilment of the promise. According to the nature of the contract, this non-fulfilment will be either the non-performance of some service; or the non-delivery of some goods, movable or immovable; or non-delivery at the covenanted time or covenanted place; or negligent custody and consequent deterioration or destruction of some article deposited by the plaintiff; or eviction of the plaintiff from some property transferred to him by the defendant; or any other omission or non-feasance. The secondary obligation of a defendant may be divided into two portions, one corresponding to the immediate value to the plaintiff of the fulfilment of the primary obligation, the other corresponding to his mediate or indirect losses occasioned by its non-fulfilment. The first portion may be regarded as principal, the second as accessory. Similarly the active obligation or claim of the plaintiff may be divided into two parts, principal and accessory. By the enactment of Justinian, in an action founded on contract, the accessory claim can never exceed the principal, or, in other words, the total claim of the plaintiff can never exceed in amount twice the value of his principal claim. In obligations arising from delict there is no primary obligation or principal claim capable of furnishing a corresponding unit of measurement. The primary obligation of the defendant is here a necessity of abstention which is not called by the Romans an obligation: and the primary right of the plaintiff is a real right, a right against all the world to freedom from molestation; which real right is not so definite or capable of exact valuation or appreciation as a personal claim. Accordingly the sanctioning right of the plaintiff in this case is left by Justinian without limitation or maximum; and the judex is directed to assess the amount of whatever damage the plaintiff has actually incurred.

The enactment of Justinian was probably suggested by the stipulatio duplae annexed to contracts of sale, whereby in case of eviction the purchaser was entitled to recover from the vendor twice the purchase-money. Vangerow, § 571.

§ 213. The owner of a murdered slave both had a civil remedy by the lex Aquilia, and could prosecute criminally under the lex Cornelia de sicariis, passed in the dictatorship of Sylla, B.C. 80.

§ 215. The lex Aquilia, like many other Roman laws, combined heterogeneous dispositions. The first and third chapters contain remedies for destruction of property, or jus in rem, that is, the injury of what is called in English law a chose in possession; the second chapter contains a remedy for the destruction of an obligation, or jus in personam, that is, the injury of what is called in English law, a chose in action. The power of one promisee, the adstipulator, to extinguish by acceptilation the right of the other promisee, the principal stipulator, was a consequence of their Correality, 3 § 110, commentary.

§ 217. The terms of the third chapter are preserved in the Digest: Ceterarum rerum, praeter hominem et pecudem occisos, si quis alteri damnum faxit, quod usserit, fregerit, ruperit injuria, quanti ea res fuit in diebus triginta proximis, tantum aes domino dare damnas esto, Dig. 9, 2; 27, 5. 'For property, other than slave or cattle slain, damaged by burning, breaking, crushing, unlawfully, the value it bore in the thirty days preceding shall be due as a judgment debt from the offender to the owner.'

§ 219. An action founded on the text of a law was called actio directa, an action not founded on the very text of the law, but granted by the praetor in the exercise of his judicial authority in circumstances which, though different, are similar to those which founded the direct action, was called actio utilis. The direct Aquilian action could only be brought when damage was immediately caused by a body to a body. If the damage was not caused by a body, or not by immediate contact, only the actio utilis could be brought. The actio utilis was some modification of the actio directa, to which it apparently contained a reference, though the precise nature of the modification and the exact terms of the reference have not been handed down. In a case of damage where neither the agent nor the patient was a body, neither directa Aquilia nor utilis Aquilia could be maintained, but only actio in factum, Inst. 4, 3, 16. The actio in factum was a still further departure from the actio directa, to which it contained no reference, and indeed was not necessarily related to any actio directa. It was so named because the formula merely proposed a matter of fact (si paret fecisse) to be verified by the judex, and, in the event of an affirmative finding, directed a condemnation.

The mode of growth of Roman law and the relation between directa Aquilia and utilis Aquilia may be illustrated by similar phenomena in English law, and the relation between the two forms of action called Trespass and Trespass on the Case. Trespass, which lies for injury to real or personal property or to the person, accompanied with violence, has a more extensive application than directa Aquilia, but viewed only as redressing injuries to personal property, is nearly coextensive in its range. The original scheme of actions, devised in comparatively barbarous times, contained no remedy for injuries where there is no act done but only a culpable omission, or where the act is not immediately injurious, but only by consequence or collaterally, or where the idea of force is inapplicable because the subject matter is not corporeal or tangible, although the injury may be by act direct and immediate in its operation. To supply such deficiencies the statute of Westminster, 13 Edward I, had directed the clerks in chancery to frame new writs whenever the old scheme of writs contained no remedy for a wrong resembling in its features other wrongs for which a remedy was provided. Accordingly, a new writ of Trespass on the Case was framed upon the analogy of the old form of Trespass (confer, ad exemplum institoriae, § 162 com.) applying to cases where the injury is not immediate, or the subject affected is not corporeal, or the agency is not bodily force. What Edward I. directed to be done by the clerks in chancery, and what was done by the introduction of the action of Trespass on the Case, was exactly analogous to what the praetors did when, in virtue of their judicial authority, they supplemented the civil law by the introduction of actiones fictitiae and actiones in factum. In respect of torts to personal property, the latter have nearly the same sphere as Trespass on the Case. The innovations of the praetor, however, were not confined to the region of torts to personal property, but pervaded every sphere and constituted a mass of supplementary law (jus praetorium), having to the remainder of the law (jus civile) similar relations and equal proportions to those which equity has to common law in English jurisprudence.

Savigny, Appendix 14, 20, gives the following as probably the ordinary formula in anaction for damages under the lex Aquilia:

Demonstratio: Quod Numerius Negidius hominem Auli Agerii injuria occidit,

Intentio: Si paret Numerium Negidium ob eam rem Aulo Agerio damnum decidere oportere,

Condemnatio: Judex, quanti is homo in eo anno plurimi fuit, tantum aes Numerium Negidium Aulo Agerio condemna: Si non paret, absolve.

DE INIURIIS.

§ 220. Iniuria autem committitur non solum cum quis pugno pulsa*tus aut* fuste percussus vel etiam verberatus erit, sed et si cui convicium factum fuerit, sive quis *bona* alicuius quasi debitoris sciens eum [ipsi] nihil debere sibi proscripserit, sive quis ad infamiam alicuius libellum aut carmen scripserit, sive quis matremfamilia*s* aut praetextatum adsectatus fuerit, et denique aliis pluribus modis.

§ 221. Pati a*utem* iniuriam videmur non solum per nosmet ipsos, sed et*iam* per liberos nostros quos in potestate habemus; item per uxores nostras qu*amvis* in manu [nostra] *non* sint. itaque si vel*uti* filiae meae quae Titio nupta est iniuriam feceris, non solum filiae nomine tecum agi iniuriarum potest, verum etiam meo quoque et Titii nomi*ne*.

§ 222. Servo autem ipsi *quidem* nulla iniuria intellegitur fieri, sed domino per eum fieri videtur: non tamen iisdem modis quibus etiam per liberos nostros vel uxores, iniuriam pati videmur, sed ita, cum quid atrocius commissum fuerit, quod aperte in *con*tumeliam domini fieri videtur, veluti si quis alienum servum verberaverit; et in hunc casum formula proponitur. at si qui servo convicium fecerit vel pugno eum percusserit, non proponitur ulla formula, nec temere petenti datur.

§ 223. Poena autem iniuriarum ex lege XII tabula*rum* propter membrum quidem ruptum talio erat; propter os vero fractum aut collisum trecentorum assium poena erat *sta-*

§ 220. Outrage is inflicted not only by striking with the fist or a stick or a whip, but by scandalous vociferation, or by maliciously seizing and advertising for sale under an order of the praetor the goods of a person as if he were insolvent or an absconding debtor, or by writing defamatory prose or verse, or by constantly following a matron or youth wearing the praetexta, and by many other modes.

§ 221. Outrage may be suffered either in one's own person, or in the person of a child in our power, or of a wife though not in our hand. So that if you insult my daughter married to Titius, but not passed out of my power into his hand, you are suable for outrage in three cumulative actions, in her name, in my name, in the name of her husband.

§ 222. A slave cannot be outraged himself, but his master may be outraged in his person, not however by all the acts whereby he might be outraged in the person of a child or wife, but only by atrocious assaults, clearly tending to dishonour the master, for instance, by flogging the slave; and for this affront a formula is provided in the praetor's album: but for verbal abuse of a slave, or striking him with the fist, no formula is provided, nor would an action be readily granted.

§ 223. The penalty of outrage in the Twelve Tables for a limb broken was retaliation: for a bone broken or bruised three hundred asses, if the person injured was a freeman;

tuta, si libero os fractum erat; at si servo, CL. propter ceteras vero iniurias XXV assium poena er*a*t constituta. et videbantur illis temporibus in magna paupertate satis idoneae istae pecuniae poenae *esse*.

one hundred and fifty if he was a slave; for other injuries twenty-five asses: and in those days of excessive poverty such sums seemed an adequate reparation.

§ 224. Se*d* nunc alio iure utimur. permittitur enim nobis a Praetore *ipsis* iniuriam aestimare; et iudex vel tanti condemnat quanti nos aestimaverimus, vel minoris, pro*ut* ill*i* *vi*sum fuerit. se*d* cum atrocem iniuriam Praetor aestimare soleat, si simul constituerit quantae pecuniae nomine fieri debeat vadimonium, hac ipsa quantitate taxamu*s* formulam, et iudex qu*amvis* possit vel minoris damnare, plerumque tamen propter ipsius Praetoris auctoritatem non audet minuere condemnationem.

§ 224. The rule now in use is different: the plaintiff is permitted by the praetor to put his own estimate on the outrage, and the judex may either condemn the defendant in the whole of this sum, or in a lesser sum at his discretion. Atrocious outrage, however, is generally for the praetor to estimate; and when he has once fixed the sum in which the defendant must give security to appear at the trial, the plaintiff inserts the same sum in the formula; and the judex, though he has the power of condemning the plaintiff in less, generally, out of deference to the praetor, will not venture to reduce the condemnation.

§ 225. Atrox autem iniuria aestimatur vel ex facto, velut si quis ab aliquo vulneratus aut verberatus fustibusve caesus fuerit; vel ex loco, velut si cui in theatro aut in foro iniuria facta sit; vel ex persona, velut si magistratus iniuriam passus fuerit, vel senatoribus ab humili persona facta sit iniuria.

§ 225. Outrages are atrocious either by the act, as when a man is wounded, horse-whipped, or beaten with a stick; or from the place, as when an affront is offered in the theatre or the forum; or from the persons, as when a magistrate or a senator is insulted by one of inferior rank.

§ 220. Injuria in this chapter denotes not any wrongful or unlawful act, but contumelious wrong, wrong tending to degradation, a violation of the right to respect, honour, reputation; such as libel, malicious prosecution, assault and battery, and the like.

§ 221. If the husband were a filiusfamilias, the offender would be liable to a fourth action, on the part of the father of the husband. In each of these actions the damages might be different, being measured by the varying dignity of the party dishonoured by the outrage.

Outrage, like theft and robbery, and unlike damage under the lex Aquilia, requires dolus malus, or unlawful design. In outrage, as in other torts, the plaintiff had his option of proceeding civilly or criminally, Inst. 4, 4, 10.

Bethmann-Hollweg supposes that the praetorian actio injuriarum contained a fictio, 4 § 32, and suggests the following formula:

Demonstratio: Quod Aulo Agerio a Numerio Negidio pugno mala percussa est,

Fictio: Si ob eam rem Numerium Negidium ex lege ab Aulo Agerio talionem pati oporteret,

Condemnatio: Quantum tibi, judex, aequum esse videbitur, tantae pecuniae dumtaxat sestertios tot Numerium Negidium Aulo Agerio condemna: Si non paret, absolve.

In the Roman law in force at the present day, as the basis or Common Law of German jurisprudence, bilaterally penal suits appear to be obsolete, with the exception of actio Injuriarum; and here the modern plaintiff has his election between pecuniary damages and an apology or revocation of the injurious utterance. An inquiry into the reason why the actio injuriarum alone has survived will illustrate the nature of bilaterally penal suits. Their principal object, as already suggested, was to induce the aggrieved party to abstain from the remedy offered him in archaic society, self-redress or private revenge. In the case of other wrongs such inducement is no longer necessary. But in the case of Affront or Dishonour the effect of the modern code of honour has led the moderns even more than the ancients to prefer the archaic institution of Feud or private war, as embodied in the Duel, to an unromantic appeal to the public tribunals. Here, then, the inducement to abstain from self-help, which elsewhere is not needed, is still required.

Theft and Rapine are removed in the present day from the Penal branch of the Private code to the Criminal code; that is, are not punished at the discretion of a private plaintiff, but by the action of a public prosecutor. Savigny, Law of Obligation, § 84.

Gaius seems to have been misled by a double meaning of Injuria when he connects the actio Injuriarum with the redress given by the Twelve Tables for grievous bodily harm, § 223. There seems to be no real connexion between bodily harm and dishonour, although both may have been denoted in Latin by the word Injuria.

After treating of obligations created by delict, Justinian proceeds to a fourth class, namely, obligations quasi ex delicto. Four instances of these are given:—(1) Si judex litem suam fecerit, i.e. if a judge makes a liability his own (or, makes a suit against himself), that is, makes himself actionable by giving a judgment contrary to law, whether from corruption or from ignorance, he was liable to

be condemned in the amount recoverable in the wrongly decided suit. (2) If any thing is thrown out of a window and occasioned damage, the paterfamilias occupying the room is liable to twice the value of the damage, although the thing was thrown by some other person. (3) If any thing is suspended dangerously over a place of public resort, the paterfamilias in occupation is liable to a penalty of ten aurei. If a filiusfamilias is residing apart from his father, and the thing is thrown or suspended from his window, the filiusfamilias and not the father is liable. The last two actions are populares, that is, the damages are recoverable by a common informer. (4) If theft or malicious mischief is committed in an inn or on board a ship by a servant or sailor, the innkeeper and shipowner are liable in twice the value.

If we ask why an unskilful surgeon or physician is liable for a delict, Inst. 4, 3, 7, whereas an ignorant judge is only liable for a quasi delict, the only answer is, that an unskilful surgeon or physician comes within the terms of the lex Aquilia, for the damage is caused by a body to a body, and the ignorant judge does not. It is observable that all the quasi delicts are, rationally speaking, genuine delicts, and apparently are only excluded in Roman law from the category of delicts because they fall under no certain statute, or because they are recent additions to the code, not from any inferior degree of culpability; for even the shipowner and innkeeper are to a certain extent blameable for employing dishonest servants or for a want of supervision (aliquatenus culpae reus est quod opera malorum hominum uteretur, Inst. 4, 5, 3). There seems, then, to be no reason for retaining in a rational system of jurisprudence the class of obligations quasi ex delicto. The class of obligations quasi ex contractu is not so easy to suppress.

All quasi delicts are suable by actio in factum.

In actions on Delict, as opposed to Real actions and actions on Contract, the liability of a defendant necessarily implies that he is convicted either of Dolus or of Culpa, unlawful intention or unlawful negligence, 3 § 211: there is no liability for damnum absque injuria.

The opposite of Negligence is Diligence, vigilance, attention, which, like Negligence, admits of an infinite variety of gradations.

Actions under the lex Aquilia, instituted to recover penalties for unlawful damage, have this peculiarity that, when Culpa is once

established, the amount of the defendant's liability does not depend on its degree.

In actions founded on Dispositions, that is on Contract and quasi-contract, the liability of the defendant depends on the degree of his negligence. In some relations a man is bound to make good losses occasioned by the slightest negligence: in others he is only compelled to indemnify for the consequences of gross negligence.

The terms, Gross and Slight, like other quantitative terms, have no positive signification until we fix upon some unit of measurement or standard of comparison to which any given instance may be referred and by which it may be measured. Two standards are frequently employed by the Roman jurists: the extraordinary care of a vigilant man of business, and the care which a given individual habitually bestows on his own interests. Although there is no necessary antithesis between these two standards, yet practically in Roman law they serve to fix the meaning of gross and slight negligence. Slight negligence is the absence of the extraordinary diligence of the most careful man of business; gross negligence is the absence of the degree of diligence which a man habitually bestows on his own concerns. The degree of diligence for which a man is held responsible depends on various principles, which may best be indicated by the following statement of the degrees of diligence exacted or of negligence imputed in the principal contracts and quasi-contracts.

Extraordinary care is required of the gratuitous borrower for use. (Is qui utendum accepit exactam diligentiam custodiae rei praestare jubetur, Inst. 3, 14, 2. In rebus commodatis talis diligentia praestanda est qualem quisque diligentissimus paterfamilias suis rebus adhibet, Dig. 13, 6, 8). The reason of this is that the contract of commodatum, being gratuitous, is solely for the advantage of the borrower. (Commodatum autem plerumque solam utilitatem continet ejus cui commodatur, et ideo verior est Quinti Mucii sententia, existimantis, et culpam praestandam et diligentiam, Dig. 13, 6, 5, 2). The same principle may be applied to the depositor and principal (Dig. 47, 2; 63, 5). Extraordinary diligence is also required of the mortgagee, (Placuit sufficere quod ad eam rem custodiendam exactam diligentiam adhiberet, Inst. 3, 14, 4. Ea igitur quae diligens paterfamilias in suis rebus praestare solet a creditore exiguntur, Dig. 13, 7, 14), the vendor, (Custodiam autem venditor talem praestare debet quam

praestant hi quibus res commodata est, ut diligentiam praestet exactiorem quam in suis rebus adhiberet, Dig. 18, 6, 3), the conductor, (Culpa autem abest si omnia facta sunt quae diligentissimus quisque observaturus fuisset, Dig. 19, 2, 257), the locator, (In judicio tam locati quam conducti dolum et custodiam, non etiam casum cui resisti non potest, venire constat, Cod. 4, 6, 28). The principle appears to be that when a contract is for the interest of both parties, although their interests are rather adverse than identical, each is responsible for the least negligence. (In contractibus bonae fidei servatur, ut, si quidem utriusque contrahentis commodum versetur, etiam culpa, sin unius solius, dolus malus tantummodo praestetur, Dig. 30, 108, 12). This principle will require the same amount of diligence from the mortgagor and vendee.

Finally, extraordinary care is required of the agent, (A procuratore dolum et omnem culpam, non etiam improvisum casum, praestandum esse, juris auctoritate manifeste declaratur, Cod. 4, 35, 13. Aliena vero negotia exacto officio geruntur, nec quidquam in eorum administratione neglectum ac declinatum culpa vacuum est, Cod. 4, 35, 21), whether authorized or unauthorized, (Quo casu ad exactissimam quisque diligentiam compellitur reddere rationem, nec sufficit talem diligentiam adhibere qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia, Inst. 3, 27, 1).

It is not easy to say why more diligence is required of the authorized agent than of the depositary, as both are unremunerated. Perhaps it is because in agency the direct and express purpose and intent of the contract is that an experienced agent should devote more skill and vigilance to the interests of the principal than the principal himself is able to bestow; whereas in other contracts diligence is merely an implied and accessory or incidental obligation.

Moreover, Agency was not really gratuitous: the honorarium of the Agent, as we have seen, though not recoverable in an ordinary action before a judex, being recoverable at the tribunal of the praetor in the exercise of his cognitio extraordinaria.

The amount of diligence a man habitually shows in his own affairs is all that is required of the following persons: the depositary, (Quod Nerva diceret latiorem culpam dolum esse, Proculo displicebat, mihi verissimum videtur. Nam etsi quis non

ad eum modum quem hominum natura desiderat diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem his quam suis rebus diligentiam praestabit, Dig. 16, 3, 32), the lender, (Quin etiam paulo remissius circa interpretationem doli mali debere nos versari, quoniam nulla utilitas commodantis interveniat, Dig. 47, 2; 63, 6). The reason is that the contract on their part is gratuitous, (Quia nulla utilitas ejus versatur apud quem deponitur, merito dolus praestatur solus, nisi forte merces accessit, tunc enim etiam culpa exhibetur, Dig. 13, 6, 5, 2).

The same principle applies to the tutor and curator, whose quasi-contract is moreover involuntary, (De omnibus quae fecit tutor, quum facere non deberet, item de his quae non fecit, rationem reddet hoc judicio, praestando dolum et culpam, et quantam in rebus suis diligentiam, Dig. 27, 3, 1, pr. The English law, it may be observed, appears to exact a greater amount of diligence than this from Trustees, though they are equally unremunerated). The same amount of diligence is required from the partner, (Venit autem in hoc judicium pro socio bona fides. Et Celsus scripsit socios inter se dolum et culpam praestare oportere, Dig. 17, 2; 52, 1. Socius socio etiam culpae nomine tenetur, id est, desidiae atque negligentiae. Culpa autem non ad exactissimam diligentiam dirigenda est: sufficit enim talem diligentiam communibus rebus adhibere qualem suis rebus adhibere solet, quia qui parem diligentem sibi socium acquirit, de se queri debet, Dig. 17, 2, 72), the husband in respect of the dotal estate, (In rebus dotalibus virum praestare oportet tam dolum quam culpam, quia causa sui dotem accipit; sed etiam diligentiam praestabit quam in suis rebus exhibet, Dig. 23, 3, 17), the coheir and colegatee, (Non tantum dolum sed et culpam in re hereditaria praestare debet coheres, quoniam cum coherede non contrahimus sed incidimus in eum. Non tamen diligentiam praestare debet qualem diligens paterfamilias, quoniam hic propter suam partem causam habuit gerendi .... Talem igitur diligentiam praestare debet qualem in suis rebus, Dig. 10, 2; 25, 16). In these latter relations both parties are interested and their interests are identical.

It must be observed that Ulpian, Dig. 13, 6, 5, places the husband and partner in the same category with the vendor vendee, hirer letter, mortgagor and mortgagee, whom we have put into the opposite category. This does not harmonize with

the authorities we have quoted, and must be regarded as an inexactitude of Ulpian. Misled by Ulpian, Sir William Jones in his treatise on Bailments lays down the principle that, when a contract is reciprocally beneficial, only ordinary diligence is required, whereas we have shown that if the interests of the parties are not identical, the Roman law, at least, requires extraordinary diligence.

He also, in measuring diligence and negligence, introduces the conception of a mean and two extremes, making three gradations of diligence (and correspondingly of negligence), ordinary diligence, less than ordinary diligence, more than ordinary diligence: but this tripartite division produces an intricacy and complication that is not to be found in the Roman jurists.

Under the head of Obligatio ex delicto should be placed, according to Savigny, the doctrine of POSSESSION (Interdict-possession), or, rather, of Dispossession, with its remedies, the Interdicts Utrubi, Uti possidetis, and Unde·vi. This would agree with the Roman arrangement: at least the Roman jurists, instead of recognizing in Possession a primary right, imposing a negative obligation on all the world (jus in rem), were content with regarding Dispossession as a wrong imposing a secondary positive obligation on the individual dispossessor, and treated all the possessory Interdicts as actions ex delicto, 4 § 140, commentary.

But the true place of Possession seems indicated by Vangerow who distinguishes between the Interdicta Retinendae and Recuperandae possessionis. The Interdictum Recuperandae possessionis, i.e. the Interdict Unde vi, is really based on obligatio ex maleficio, and belongs to Penal jurisprudence: whereas Possession as contemplated by the Interdicta Retinendae possessionis, i.e. the Interdicts Uti possidetis and Utrubi, is a primary right demanding universal recognition (jus in rem) that has its place in the code regulating Dominion: and the interdicts allotted for its protection, though nominally based on obligatio ex delicto are really coordinate not with Penal actions, but with Real actions or Vindicatio. Gaius only deals with Possession and possessory Interdicts as belonging to the code of Procedure, without indicating their position in the code of Substantive law.

BOOK IV.

DE ACTIONIBUS.

§ 1. *Si quaeritur*, quot genera actionum sint, verius videtur duo esse: in rem et in personam. nam qui IIII esse dixer*unt* ex sponsionum generibus, non animadverterunt quasdam species actionum inter genera se rettulisse.

§ 2. In personam actio est qua agimus quotiens cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est *contendimus*, id est cum intendimus dare, facere, praestare oport*er*e.

§ 3. In r*em* actio est, cum aut corporalem rem intendimus nostram esse, *aut i*us aliquod nobis co*m*petere, velut utend*i*, aut utendi fruend*i*, *eu*ndi, agendi aquamve ducendi, vel altius tollendi *vel pr*ospiciendi. item actio ex diverso adversario est neg*ati*va.

§ 4. Sic itaque discretis actionibus, certum est *non pos*se nos rem

§ 1. We have now to treat of Actions, which fall into two classes, being either Real or Personal: for those who count four classes, including the forms of sponsio, commit the error of co-ordinating subclasses and classes.

§ 2. A Personal action seeks to enforce an obligation imposed on the defendant by his contract or delict, that is to say, is the contention that he is bound to transfer some dominion or to perform some service or to repair some loss.

§ 3. A Real action is my claim of some dominion or some fraction of dominion, as a right of use or usufruct of a thing belonging to my neighbour, a right of horseway or carriage-way through his land, of fetching water from a source in his land, of raising my house above a certain height, or of having the prospect from my windows unobstructed; or the opposite contention of my neighbour, his denial that I have any such fraction of dominion.

§ 4. Real and Personal actions being thus distinguished, it is clear

nostram ab alio ita petere, SI PARET EUM DARE OPORTERE: nec enim quod nostrum est, nobis dari potest, cum solum id dari nobis intellegatur quod *ita datur*, *ut* nostrum fiat; nec res quae *est nostra*, nostra amplius fieri potest. plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra poenam dupli aut quadrupli rei recipiendae nomine fures ex hac actione etiam teneantur, SI PARET EOS DARE OPORTERE, quamvis sit etiam adversus eos haec actio qua rem nostram esse petimus.

that I cannot demand my property from another in the following form: 'If it be proved that the defendant is bound to convey such property to me.' What is my own cannot be conveyed to me, for conveyance to me makes a thing mine, and what is already mine cannot be made more mine than it is. Yet, for the prevention of theft and multiplication of remedies against the thief, besides the penalty of twice the value of the thing stolen awarded against the thief not caught in the act, and the penalty of four times the value against the thief caught in the act, the thing itself may be recovered by a personal action in which the contention is thus worded: 'If it be proved that the defendant ought to convey the thing in question,' as well as by the real action thus formulated: 'If it be proved that the thing in question is the property of the plaintiff.'

§ 5. Appellantur autem in rem quidem actiones vindicationes; in personam vero actiones quibus dare fierive oportere intendimus, condictiones.

§ 5. A Real action is called vindicatio; a Personal action, whereby we contend that some property should be conveyed to us or some service performed for us, is called condictio.

§ 6. Agimus autem interdum, ut rem tantum consequamur, interdum ut poenam tantum, alias ut rem et poenam.

§ 6. We sue sometimes only for property [to which we have a title, real or personal], sometimes only for a penalty, sometimes both for our property and for a penalty.

§ 7. Rem tantum persequimur velut actionibus *quibus* ex contractu agimus.

§ 7. We sue only for our property in (real actions and in) personal actions founded on contract.

§ 8. Poenam tantum consequimur velut actione furti et iniuriae et secundum quorundam opinionem *actio*ne vi bonorum raptorum; nam ipsius rei et vindicatio et condictio nobis *com*petit.

§ 8. We sue only for a penalty in actions of Theft and Outrage, and, according to some, of Rapine; for our property itself may be recovered either by Real or by Conservative (non-penal) personal action.

§ 9. Rem vero et poenam persequimur velut ex his causis ex quibus adversus infitiantem in duplum agimus: quod accidit per actionem iudicat*i*, depensi, damni in*iuriae*

§ 9. We sue both for our property and for a penalty in those actions where the defendant who denies his obligation is condemned to pay double, as in the action to recover a

legis Aqu*iliae*, *et rerum* legat*a*rum nomine quae per damnationem cer*tae* relictae sunt.

judgment debt, to recover money paid by a sponsor for his principal, to recover damages for injury to property under the lex Aquilia, and to recover legacies of a definite amount bequeathed by condemnation of the successor.

§ 1. From Substantive law Gaius now passes to the law of Procedure, confining himself for the most part to its Material as opposed to its Formal aspect: dealing with procedure, that is to say, not so far as it is merely the method of realizing pre-existing rights, but rather so far as its stages are titles which, like Dispositions and Torts, themselves originate new rights and new obligations.

If we inquire which code is the earlier in its development, the Substantive code or the code of Procedure, the answer is that they are essentially contemporaneous: a Substantive code can have no actual existence unless there is some method of giving it force, and again a code of procedure can have no meaning unless there is a substantive law to be administered. But after recognizing that the two codes are correlative and necessarily coexistent, we find that historically the code of Procedure is prior in the chronological order: it attains to a high grade of development, while the Substantive code which started into birth at the same time remains in a rudimentary undeveloped condition. The tribunals once established by the legislator soon evolve strict rules to govern their proceedings, while the legislator is too much occupied with wars domestic and foreign to furnish the substantive law which the tribunals ought to administer.

The following contrast of ancient and modern jurisprudence here deserves a notice. No primary rights can be conceived without sanctioning rights, or rights which arise when the primary rights are violated: and again no sanctioning rights can be conceived without Actions or modes of evoking the interposition of the sovereign power. And, as Rights imply Actions, so reciprocally Actions imply Rights. But though, as corresponding or correlated terms, Right and Action have a necessary connexion, and the existence of one may be inferred from the existence of the other; two systems of jurisprudence may differ as to which of these terms, the Right or the Action, they deem the more evident; which they regard as the datum and which the matter to be proved; which the logical premiss and which the conclusion.

In Rome the Remedy was regarded as the certainty; the Right, primary or sanctioning, as the matter of deduction. The forms of Action, emphatically so in Statute-process and to a great degree in the Formulary system, as crystallized in the law or in the edict, were capable of enumeration and incapable of multiplication; and from these forms the citizen might deduce the list of his rights and obligations. The logic of the ancient jurist may be expressed in the maxim: Where there is a Remedy there is a Right: There is no Right unless there is a Remedy.

The modern jurist assumes the other, the more ideal of the two correlated terms, to be the more evident, and acts upon the converse maxim: Where there is a Right there is a Remedy; or, Given the Right, the Remedy follows. The action now is the dependent term: its forms are unimportant and indefinitely variable; they are no longer crystallizations. If a Right is established and no appropriate form of action seems to exist, a new one is forthwith invented, and its fitness to enforce the established right is sufficient to procure its recognition by the judicature. Such at least, if not opposite goals at which ancient and modern jurisprudence have arrived, appear to be opposite directions in which they diverge. Ihering, § 50.

Sponsio or wager was an indirect mode of submitting questions to judicial decision, which seems to have been very commonly employed before the introduction of the formulary system. We are left to conjecture how its classification enabled any jurist to count four classes of action. Its principal division seems to be into the sponsio where the pecuniary risk was serious and the penal sum important (sponsio poenalis), and the sponsio where the penal sum was nominal and not actually exacted (sponsio praejudicialis). Adding these two divisions to real and personal actions, we should have four classes. But as every sponsio, asserting an obligation arising from stipulation, was a species of personal action, this classification would involve a co-ordination of sub-genera and genera, or subdivisions and divisions.

A Real action is one which asserts a jus in rem, a Personal action one which asserts a jus in personam. A jus in rem, we may remember, is a right to certain forbearances, or freedom from molestation, corresponding to a duty imposed on all the world; a jus in personam is a right to certain performances corresponding to a duty imposed on a determinate person. Jura in rem are Status, or Property, or Servitude, that is, some fraction of property. Jura

in personam are Obligations founded on either contract or delict. Primordial rights (life, limb, liberty, honour, &c.), though jura in rem, do not give rise to real actions; their violation engenders an obligation in the violator, which is pursued by a personal action ex delicto.

A Real action, accordingly, asserts either the status or the proprietorship of the plaintiff, if we include under proprietorship the elements of property called easements or servitudes; a Personal action asserts an obligation of the defendant towards the plaintiff.

Real and Personal actions of Roman law must not be identified with those of English law. A Real action in English law may be defined with sufficient accuracy for our present purpose as an action whereby we claim property in an immovable; a claim of property in a movable is made by Personal action. In Roman law a claim of property in a movable is a Real action just as much as a claim of property in an immovable. A Personal action in Roman law asserts no property existing in the plaintiff, but an obligation or right to a conveyance or transmutation of property from the defendant to the plaintiff.

To make the English and Roman classifications coincide, Detinue and Trover (actions for the recovery of movable property) ought to be classed with real actions.

A Real action names no party but the Plaintiff in the intentio, the principal part of the formula or written instructions of the praetor to the judex, in which the plaintiff's claim is specified; a Personal action names the defendant as well as the plaintiff in the intentio. For instance, a vindicatio asserting the status of a person contained an intentio to this effect: Si paret Titium ex jure Quiritium liberum esse.

(We have no record of the precise form of the intentio in a controversy of status. We know that in a question of libertas (liberalis causa), until the time of Justinian, the person whose freedom was in dispute could not be either plaintiff or defendant, his rights were advocated by an Assertor, Cod. 7, 17, De assertione tollenda. In Justinian's time the formulary system, with its precisely framed intentio, no longer existed.)

A vindicatio asserting property in land or a slave contained an intentio in these words: Si paret illum fundum—illum hominem—ex jure Quiritium Auli Agerii (Plaintiff) esse. A vindicatio claiming not absolute property, but some element of property, for instance,

a rural servitude, contained an intentio to this effect: Si paret jus eundi per illum fundum ex jure Quiritium Aulo Agerio competere.

A Personal action, on the contrary, named in the intentio the defendant, who was alleged to be under an obligation to the plaintiff. E. g. if the plaintiff alleged that the defendant lay under an obligation to pay him a certain sum of money, the intentio was in this form: Si paret Aulo Agerio Numerium Negidium (defendant) sestertium decem millia dare oportere.

The word Dare is used in the Intentio of a Condictio Certi, i. e. an action wherein the plaintiff asserts that the defendant is under an obligation to convey quiritary property in a determinate thing, whether a sum of money or any other subject of property, a certain slave, certain corn, certain land. E. g. Si paret Numerium Negidium Aulo Agerio sestertium decem millia—tritici Africi optimi centum modios—iter per illum fundum ad illum fundum—dare oportere.

The word Facere never appears to stand alone in an intentio, but in its stead we have Dare facere in the Intentio of Condictio Incerti, that is, of an action to enforce a claim of an uncertain amount, a claim of any service but the transfer of quiritary property in a certain thing, that is, to enforce any obligation (except those expressed by Praestare) not included under Dare as above defined. E. g. Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere.

Praestare does not appear to have ever been used in the Intentio of a Formula. Praestare is a term of wider meaning than the two preceding, and appears specifically to denote reparation for any harm, compensation for any loss, the fulfilment, that is, of a delictual obligation. It is also used in connection with the obligation ex fide bona arising out of culpa and dolus relating to Contract. In all civil actions founded on Delict the intentio was probably in the terms: damnum decidere oportere, § 37. All non-civil or praetorian actions had an intentio in factum concepta.

§ 3. Negativa. An action respecting a servitude was either Confessoria or Negativa. If the plaintiff claimed a servitude over the land or house of the defendant, his action was called Confessoria; if he denied that his own land or house was subject to a servitude, his action was called Negativa (or Negatoria) in rem actio. In Confessoria the intentio was of the form: jus mihi esse, invito te, utendi fruendi: in Negatoria of the form; jus tibi non esse,

me invito, utendi fruendi. In this action the plaintiff, probably, was not bound to prove a negative, but only the existence of his own dominion; it would then be incumbent on the defendant to prove affirmatively a limitation of this dominion.

The coexistence of actio confessoria and actio negatoria with the antithesis of Positive and Negative servitudes is at first sight embarrassing: for we might suppose that an actio Confessoria of a jus altius tollendi was equivalent to an actio Negatoria of a jus altius Non tollendi; and that an actio Confessoria of a jus altius Non tollendi was equivalent to an actio Negatoria of a jus altius tollendi: so that the law would be encumbered by a redundancy of forms.

The following appears to be the explanation and to reconcile statements in our authorities which at first sight are inconsistent. The nature of the Servitude, Positive or Negative, alleged by the plaintiff and, consequentially, the character of the action, Confessoria or Negatoria, which he instituted, depended on the nature of the facts on which he relied as his title and on the nature of the allegations by which the defendant opposed his claim.

The plaintiff asserted a right of raising the height of his house by an actio Confessoria of a jus altius tollendi, consistently with the statement of Gaius, 4 § 3, if he alleged the Extinction of a former jus altius Non tollendi, i.e. the recovery of his original freedom; for we have mentioned, 2 § 31, that the extinction of an Urban servitude could only be accomplished by the erection of a contrary or antagonistic servitude: he asserted it by an actio Negatoria of a jus Non altius tollendi; consistently with Dig. 8, 5, 4, 7, (competit etiam de servitute actio domino aedificii Neganti servitutem se vicino debere) if he denied that such a jus Non altius tollendi had ever existed.

Similarly a right of prohibiting a neighbour from raising the height of his house would probably be asserted by actio Confessoria of jus Non altius tollendi if the defendant denied that such a right had ever existed: by actio Negatoria of jus altius tollendi, consistently with Inst. 4, 6, 2, (si quis intendat jus non esse adversario . . . altius tollendi . . . istae quoque actiones in rem sunt sed Negativae), if the defendant contended that, though it once existed, it had been extinguished by usucapio libertatis.

Whether an action was Confessoria or Negatoria was perhaps not manifest on the face of the intentio but depended on the

nature of the facts by which the intentio was supported. For instance, in Dig. 8, 5, 4, 7, where Ulpian is apparently speaking of actio Negativa of jus Non altius tollendi, he presently adds: hoc igitur intendo, habere me jus altius tollendi invito eo cum quo ago: terms which seem more appropriate for expressing an actio Confessoria of a jus altius tollendi; and which probably would express such an action, if the plaintiff intended to aver a reacquisition of his original freedom.

In both Confessoria and Negatoria the first proof was incumbent on the plaintiff. The plaintiff Negator of jus Non altius tollendi or Confessor of jus altius tollendi had first to adduce proof in support of his contention—which in this case would be simply to prove the fact of his dominion—before the defendant was called upon to prove his opposite contention: and the plaintiff Confessor as dominant owner of a servitude must begin with adducing proof of its existence before the defendant is called upon to disprove its existence or to prove its extinction.

The abolition in England of real actions has destroyed most of the likeness that once existed in the remedies provided by English law for the protection or impeachment of Incorporeal hereditaments (more or less identical with the rights which the Romans called Servitudes) and the remedies by which at Roman law Servitudes were protected or impeached. Before the abolition of Real actions each incorporeal hereditament was asserted or contested by some Real action corresponding either to actio Confessoria or to actio Negatoria. After their abolition the only remedy is Trespass or Trespass on the case (or their modern equivalents), personal actions which procure not restitution of a real right, but satisfaction in damages for injury sustained by its contravention, and which will lie as often as the wrong is repeated: or the Court of Chancery will stay the continuance or progress of a wrong by the issue of an Injunction.

As the absolute right of Dominion is supplemented by a less perfect right, the right of Possession, protected by possessory interdicts instead of vindicatio, the remedy of Dominion; so the fraction of Dominion or perfect right which forms a Servitude is supplemented by an imperfect right, a right of Quasi-possession, also protected by Interdicts, some identical with those which protect Dominion, some varying with the nature of the Servitude, § 139.

§ 4. Gaius points out that the Roman law of his day was

illogical in allowing stolen property to be recovered by Personal action. No translation of property is operated by theft. Roman law contained no disposition similar to that of English law, that property in stolen goods is transmuted by sale in market overt. Even in the hands of a third person, an innocent purchaser, the thing remained the property of the original owner, exempt from the potent chemistry of usucapion. It follows that the only action logically competent to the proprietor who still remained proprietor was a real action.

In the condictio ex causa furtiva, instead of the intentio, Si paret dare oportere, § 4, which implies that the plaintiff is not proprietor, we might have expected him to sue with the intentio, Dare facere oportere, which might be merely a form of claiming redelivery of possession, and accordingly would be consistent with his proprietorship. The following is the explanation why the other formula was allowed: A condictio certi for a certain sum of money was accompanied by a sponsio poenalis in a third of the sum in dispute, to be forfeited by the party who lost the action, 4 § 171. In order to subject the thief to this further penalty, the legislator, at the cost of an anomaly, permitted the plaintiff to sue with the formula, Si paret dare oportere.

§ 5. Condictio is an actio stricti juris. It excludes actions ex fide bona (which had an intentio: Quidquid dari fieri oportet ex fide bona, § 47) actions ex delicto, and praetorian actions, or actions in factum. It is divided into Condictio incerti, with an intentio Quidquid paret dare facere oportere, and Condictio certi, with an intentio, Si paret dare oportere. The latter is either brought to recover a certain sum of money, and then is specially called Condictio certi, or is brought to recover land or a slave or any other certain thing, and then is called Condictio triticaria. The origin of this name is doubtful. Petitio, sometimes equivalent to vindicatio, is sometimes also equivalent to Condictio certi. In both cases it denotes the certainty and individuality of the property claimed.

In condictio certi both the intentio (which names certa pecunia) and the condemnatio are certae. In condictio triticaria the intentio (which names some other certa res) is certa; the condemnatio (quanti ea res erit) is incerta. In condictio incerti both intentio and condemnatio are incertae.

§ 6. Rights may be divided into primary and secondary. Primary

rights are antecedent to wrong, and may be divided into status, primordial rights, property, and obligation; the title or investitive fact which creates them being a condition defining a status or capacity of primordial rights, or one of the modes of acquiring property or of forming a contract. Secondary or sanctioning rights imply an antecedent wrong, and their title is a breach of contract or the violation of some real right, statistic, primordial, or proprietary.

Both these classes of rights and the corresponding duties are creations of the law: for every law is both imperative and punitory; that is, both by its command confers a primary right and imposes a corresponding primary duty, and sanctions its command by conferring a secondary right and imposing a secondary duty, that is, by conferring a remedy and imposing a punishment (if punishment, besides penal execution, which it denotes in the next sentence, may include mere restitution or compensation) in the event of disobedience.

The sanctions of the civil law are either reparative and remedial or penal and preventive; in one case the object of the law is the RESTORATION of the plaintiff by restitution or compensation, and then his primary right is generally the measure of his redress or sanctioning right; in the other case it is the repression of similar wrongs by inflicting an exemplary PUNISHMENT on the defendant which may operate as a terror to other wrong-doers; and then the sanctioning right may far exceed his primary right. That even RESTORATION often exceeds the primary right appears from p. 472.

The language of Roman jurisprudence makes no distinction between a primary right and a sanctioning right when the sanction is purely RESTORATIVE, even though the restoration exceed the primary right, calling both by the name of the Thing (Res). The redress directly given by the Roman law was always pecuniary compensation, and we might have expected Roman jurists above all others to distinguish between the plaintiff's primary and secondary right; but the indirect result of a real action might be the recovery of specific restitution, and it was in view of this type of redress that the Roman lawyers were led to speak of primary and sanctioning proprietary rights as identical.

If we next proceed to inquire what classes of actions are brought for reparation or the recovery of property (rei persecutio), and what for the recovery of a penalty (poenae persecutio), we shall have no

difficulty in perceiving that real actions and actions on contract belong to the former class (rei persecutio); and that of actions on delict, a subdivision, which may be called Vindictive (quae ad ultionem pertinent, quae vindictam continent), such as the actio injuriarum, belong to the latter (poenae persecutio). The effect of the former is restoration: they leave the plaintiff no richer and the defendant no poorer in respect of property than he was at first; whereas the vindictive actions leave the plaintiff, in respect of property, richer, and the defendant poorer. But the remaining division of actions on delict, those brought to recover indemnification for damage to property, are more ambiguous in character. If we merely regard their effect on the plaintiff they seem to be purely reparative, for they leave the plaintiff no richer; but if we regard their effect on the defendant they seem to be penal, for if the wrong done by the defendant was a destruction of property, compensation to the plaintiff will leave the defendant poorer.

We have seen, 3 § 212, that, even under a contract, indemnification included indirect losses or the mediate value of the primary right, and might amount to twice the immediate value of the primary right: and that, founded on delict, indemnification was not restricted to any maximum.

Accordingly, with respect to these semi-penal [unilaterally penal] actions, the language of the Roman jurists varies, they are sometimes regarded as rei persecutio, and sometimes as poenae persecutio; but the latter view predominated, and they have the principal incidents of penal actions: they are only maintainable within a year, and are not passively transmissible, i. e. maintainable against the successor of the defendant except so far as restorative, i. e. so far as the successor was enriched, unless the suit was commenced (lis contestata) against the original wrong-doer, in which case the penal obligation is novated, 3 § 180, and becomes passively transmissible. These incidents are resumed in the following passage of the Digest: Si possessionis causa deterior facta esse dicetur dolo ejus qui in possessionem missus sit, actio in eum ex dolo datur, quae neque post annum neque in heredes ceterosque successores dabitur, quum ex delicto oriatur poenaeque nomine concipiatur, nisi quatenus ad eos pervenit; heredi autem dabitur quia et rei continet persecutionem, Dig. 42, 5, 11. 'If the possession is deteriorated by the fraud of the person sent to seize the estate of the judgment debtor, an action of Fraud is maintainable against him, but not after a

year, nor against the successor of the defendant, as it is founded on delict and penal, except so far as the successor is enriched by the fraud of the wrong-doer; but is transmissible to the successor of the plaintiff, as its object is reparation.' The last words seem to mean: because it is not Vindictive: for, with the exception of Vindictive actions, even purely penal actions are actively transmissible, i. e. transmissible to the heir of the plaintiff, § 112.

In these cases, accordingly, the plaintiff had not always an adequate remedy under the Roman law. English law originally followed the rule of Roman law, and no action of Tort, even for damage to property, would lie against the executor or administrator of the wrong-doer. [The maxim: actio personalis moritur cum persona, often used by expositors of English law, must have originated in a misprint of personalis for poenalis.] But now, by 3 and 4 Will. IV, c. 42, an action for injury to property, as opposed to actions for slander and the like (vindictive actions, which die with the person), is maintainable against the executors and administrators of the wrong-doer, provided the wrong was committed within six months before his death and the action is brought within a year after his death, if it was an injury to real property, or within six months after his executors or administrators have taken on themselves administration, if it was an injury to personal property. Thus the English plaintiff has an ampler remedy than the Roman.

Damages in English law means any uncertain amount of money: i. e. a claim for damages includes rei persecutio, where the res is incerta, as well as poenae persecutio. An obligation to pay a certain sum is called a Debt.

§ 7. One action upon contract, namely, the action against a depositary, was brought for double the value of the deposit, i. e. was partly penal, if the deposit was necessitated by fire, shipwreck, tumult, or similar distress.

§ 8. In Justinian's time the penalty of Rapine was only thrice the value of the thing taken with violence, that is, the quadruple damages were partly penal, for the actions vi bonorum raptorum and the real or personal action to recover the thing taken were not concurrent or cumulative. For a case of quadruple damages, of which $\frac{1}{4}$ was restorative and $\frac{3}{4}$ penal, under 9 Anne, c. 14, against Gaming, see Stephen's Blackstone, Introduction, p. 3.

§ 9. The actio judicati was brought against a defendant who denied that a judgment had been given against him or that it was

still unsatisfied. He was liable to be condemned to pay twice the amount of the judgment debt, and was required to give security judicatum solvi. This security was the modern representative of the interposition of a Vindex in the old proceeding of manus injectio. In manus injectio pro judicato it seems the Vindex who lost the suit was condemned, as a penalty for his Tortious interference, to pay a sum equal to the original judgment debt; in other words, to discharge the debtor he had to pay twice the amount of the debt. In manus injectio pura the defendant was his own Vindex, and, if he lost, was condemned in double the debt.

The actio depensi [see above, 3 § 127] was introduced by a lex Publilia of uncertain date, and as it was only given to the sponsor, would become obsolete when the sponsor was superseded by the fidejussor.

Justinian confined the action of the legatee against the heres for twice the value of the legacy to the case of bequests to churches and religious institutions. Inst. 3, 27, 7.

LEGIS ACTIONES.

§ 10. Quaedam praeterea sunt actiones quae ad legis actionem exprimuntur, quaedam sua vi ac potestate constant. quod ut manifestum fiat, opus est ut prius de legis actionibus loquamur.

§ 10. Some actions are moulded upon, and contain a reference to, the forms of statute-process; others are unrelated and independent. This requires an examination of the older system.

§ 11. Actiones quas in usu veteres habuerunt legis actiones appellabantur, vel ideo quod legibus proditae erant, quippe tunc edicta Praetoris quibus *com*plur*es* actiones introductae sunt nondum in usu habebantur; vel ideo quia ipsarum legum verbis accommodatae erant, et ideo immutabiles proinde atque leges observa*ba*ntur. unde cum qui*s* de vi*t*ibus succisis ita egisset, ut in actione vites nominaret, responsum est eum rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio *com*peteret, generaliter de arboribus succisis loqueretur.

§ 11. These proceedings are called statute-process, either because they were appointed by statute before the edict of the praetor, the source of many new actions, began to be published, or because they followed the letter of a statute and in form were as immutable as law. Thus, a man who sued another for cutting his vines, and in his action called them vines, lost his right because he ought to have called them trees, as the Twelve Tables, which confer the action, speak generally of trees and not particularly of vines.

§ 12. Lege autem agebatur mo-

§ 12. There were five forms of

dis quinque: sacramento, per iudicis postulationem, per condictionem, per manus iniectionem, per pignoris captionem.

statute-process, Sacramentum, Judicis postulatio, Condictio, Manus injectio, and Pignoris captio.

SACRAMENTUM.

§ 13. Sacramenti actio generalis erat: *de* quibus enim rebus ut aliter ageretur lege cautum non erat, de h*is* sacramento agebatu*r*. eaque actio perinde periculos*a* erat falsi *no*min*e*, atque hoc tempore periculosa est actio certae creditae pecuniae propter sponsionem qua periclitatur reus, si temere neget, *et* restipulationem qua periclitatur actor, si non debitum petat: nam qui victus erat summam sacramenti praestabat poenae nomine: *eaque in publicum cede*ba*t praedes*que eo nomine Praetor*i* dab*antur*, non ut nunc sponsionis et restipulationis poena lucro cedi*t* adve*rsario* qui vicerit.

§ 13. Sacramentum (Stake or Deposit) was the general action, for wherever no other mode was appointed by law, the procedure was by sacramentum. It was attended with risk to the parties, like the modern action to recover money lent, wherein the defendant and plaintiff by the sponsio and restipulatio respectively forfeit a penal sum, if unsuccessful. The praetor took securities for the stake, which the vanquished party forfeited to the treasury, not, as he forfeits the penal sum of the modern sponsio or restipulatio, to the victor in the suit.

§ 14. Poena autem sacramenti aut quingenaria erat aut quinquagenaria. *nam* de rebus mille aeris plurisve quingentis assibus, de minoris *vero* quinquaginta assibus sacramento contendeb*atur;* nam *ita* lege XII tabularum cautum erat. *sed si de libertate* hominis *contro*versia erat, etsi pretiosissimus homo esset, tamen ut L assibus sacramento contendere*tur*, ea*dem* lege cautum est favoris *causa*, *ne sat*is*dati*one *one*rarentur adsertores [*desunt* 23 *lin.*]

§ 14. The penal sum of the sacramentum was either five hundred asses or fifty asses; five hundred when the subject of dispute was valued at a thousand or upwards, fifty when at less than a thousand. This was provided by the law of the Twelve Tables. When, however, personal freedom was the subject of dispute, however valuable a slave the man whose status was litigated might be, the penal sum was only fifty asses. This was enacted by the Twelve Tables in favour of liberty, that the vindex or assertor of liberty might never be deterred by the magnitude of the risk.

§ 15. . . . . ad iudicem accipiundum venirent. postea v*ero* reversis dabatur *post diem* XXX. iudex: *idque* per legem Pinariam factum est; ante eam autem legem . . . dabatur iudex. illu*d* ex superioribus intellegimus, si de re minoris quam M aeris agebatur, quinquagenario

§ 15. [When the sacramentum was a personal action, that is to say, instituted to enforce an obligation, after giving securities for the stake, the parties left the praetor's court, having arranged to reappear on the thirtieth day] to receive a judex. When they appeared again

sacramento, non quingenario eos contendere solitos fuisse. postea tamen quam iudex datus esset, comperendinum diem, ut ad iudicem venirent, denuntiabant. deinde cum ad iudicem venerant, antequam aput eum *causam* perorarent, solebant breviter ei et quasi per indicem rem exponere: quae dicebatur causae collectio, quasi causae suae in breve coactio.

§ 16. Si in rem agebatur, mobilia quidem et moventia, quae modo in ius adferri adducive possent, in iure vindicabantur ad hunc modum. qui vindicabat festucam tenebat. deinde ipsam rem adprehendebat, velut hominem, et ita dicebat: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM SICUT DIXI. ECCE TIBI VINDICTAM INPOSUI: et simul homini festucam inponebat. adversarius eadem similiter dicebat et faciebat. cum uterque vindicasset, Praetor dicebat: MIT*TI*TE AMBO HOMINEM. illi mittebant. qui prior vindica*verat*, *ita alterum interroga*bat: POSTUL*O* ANNE DICAS QUA EX CAUSA VINDICAVERIS. ille respondebat: IUS PEREGI SICUT VINDICTAM INPOSUI. deinde qui prior vindicaverat dicebat: QUANDO TU INIURIA VINDICAVISTI, D AERIS SACRAMENTO TE PROVOCO. adversarius quoque dicebat: SIMILITER EGO TE. se*u* L asses sacramenti nominabant. deinde *eadem* sequebantur quae cum in persona*m* ageretur. Postea Praetor secundum alterum eorum vindicias dicebat, id est interim aliquem possessorem constituebat, eumque iubebat praedes adversario

on the thirtieth day the Praetor nominated a judex. This was in pursuance of the lex Pinaria, before which the judex [was named at an earlier period ?]. If the subject of dispute was worth less than a thousand asses, the stake, as before mentioned, was only fifty. After the judex was named, they gave mutual notice to appear before him on the next day but one. At the appearance before the judex, before the case was fully developed, it was stated in a concise and summary form, and this summary statement was called causae collectio [or causae conjectio].

§ 16. When the sacramentum was a real action, movables and animals that could be brought or led into court were claimed in presence of the praetor in the following fashion. The claimant held a wand, and grasping the slave or thing over which he claimed dominion, said: 'This man I claim, as proprietor, by the law of the Quirites, by the title which I have shown. Lo you, thus upon him I lay my lance,' whereupon he touched the man with his wand. The adversary then said the same words and performed the same acts. After both had claimed dominion, the praetor said: 'Both claimants quit your hold,' and both quitted hold. Then the first claimant said, addressing the second: 'Answer me, will you state on what title you found your claim ?' and he replied: 'I stated my title before I touched him with my lance.' Then the first claimant said: 'Since you claim him in defiance of law, I challenge you to stake five hundred asses upon the issue of a trial,' to which the other answered, 'I accept the challenge.' Or else they wagered fifty asses. Then ensued the same ceremonies as in a personal action.

dare litis et vindiciarum, id est rei et fructuum: alios autem praedes ipse Praetor ab utroque accipiebat sacramenti, quod id in publicum cedebat. festuca autem utebantur quasi hastae loco, signo quodam iusti dominii: *maxime enim* sua esse credebant quae ex hostibus cepissent; unde in centumviralibus iudiciis hasta praeponitur.

The praetor then awarded to one of the claimants possession of the thing pending the suit, and made him bind himself with sureties to his adversary to restore both the subject of dispute and the mesne profits or value of the interim possession, in the event of losing the cause. Both parties gave pledges to the praetor for the penal sum which the loser was to forfeit. The wand or straw which they wielded represented a lance, the symbol of absolute dominion, for the best title to property was held to be conquest. Accordingly the law of property is administered in the Centumviral court at the present day under the symbol of a lance.

§ 17. S*i* qua res talis erat, ut *non* sine incommodo posset in ius adferri vel adduci, velut si columna aut grex alicuius pecoris esset, pars aliqua inde sumebatur. deinde in eam partem quasi in totam rem praesentem fiebat vindicatio. itaque ex gre*g*e vel una *o*vis aut capra in ius adducebatur, vel et*iam* pilus inde sumebatur et in ius adferebatur; ex nave vero et columna aliqua pars defringebatur. similiter si de fundo vel de aedibus sive de hereditate controversia erat, pars aliqua inde sumebatur et in ius adferebatur et in eam partem perinde atque in totam rem praesentem fiebat vindicatio: velut ex fundo gleba sumebatur et ex aedibus tegula, et si de hereditate controversia erat, aeque [*folium deperditum.*]

§ 17. If the subject of dispute was such as could not conveniently be carried or led before the praetor, a portion was brought into court, and the formalities were enacted over it as if it was the whole. If it was a flock of sheep or herd of goats, a single sheep or goat, or a single tuft of hair was brought; if it was a ship or column, a fragment was broken off and brought; if it was land, a clod; if it was a house, a tile; if it was an inheritance. . . .

§ 13. The sacramentum or stake was originally deposited with the Pontifex and applied, when forfeited, to meet the expenses of the public sacrifices; whence its name. Afterwards, instead of an actual deposit, security [praedes = prae-vades] for the penal sum was given by both parties to the praetor.

In the ceremony as described by Gaius we may distinguish three stages: first, an oral pleading or altercation [secundum suam causam sicut dixi—Jus peregi sicut vindictam imposui]; secondly,

a trial by battle, the original method of deciding disputed rights; and thirdly, the reference to peaceful adjudication. We may suppose that on some memorable day in the progress of civilization, before the combat had terminated fatally to one of the combatants, some Numa Pompilius, of sufficient authority to make so great an innovation, interposed and induced the parties to refer the dispute to arbitration. The case would afterwards serve as a model and precedent to future litigants; but, from a superstitious fear of losing the sanction of immemorial custom, the earlier stages of the process would still continue to be mimicked in solemn pantomime. So, in English law, trial by Wager of battle, introduced by William the Conqueror, was first partially superseded by the Grand assize, or trial by jury, an alternative substituted by Henry II, and was finally abolished in the reign of George III. 'The tenant [defendant] shall not be received to wage battle, nor shall issue be joined, nor trial had, by battle, in any writ of right,' 59 Geo. III, ch. 46.

The use of the rod or wand as representative of the spear, the symbol of dominion, may be paralleled in English law by the delivery of a staff as the symbol of power and possession in the conveyance of copyholds. 'The conveyance of copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser by redelivery of the same in the presence of a jury of tenants,' Blackstone, 2, 20.

Part of the proceedings in the sacramentum was a ceremony denoted by the words manuum consertio. The Twelve Tables contained the expression, Si qui in jure manum conserunt, which is varied in a line of Ennius, Non ex jure manum consertum [vocant] sed mage ferro Rem repetunt. An explanation of the variance is given by Aulus Gellius. When land was the subject of controversy, the praetor originally repaired with the litigants to the spot, and they there performed in his presence (in jure) the ceremony of manuum consertio. But when the Roman territory was extended, the parties went without the praetor, each attended by his suit of witnesses; and finally, even the departure of the litigants was merely fictitious. This was the case in the time of Cicero, who gives the following fragments of the Sacramental procedure. He gives them disjointedly, but they perhaps form successive portions of the proceedings in a single action. Fundus qui est in agro qui Sabinus vocatur . . . eum ego ex jure Quiritium meum esse aio . . . Inde ibi ego te ex jure manum consertum voco . . . Unde tu me ex

jure manum consertum vocasti, inde ibi ego te revoco. . . . Suis utrisque superstitibus praesentibus istam viam dico. Inite viam . . . Redite viam . . . Quando te in jure conspicio . . . sed anne tu dicis qua ex causa vindicaveris, Pro Murena, 12. 'The estate in the Sabine land [between such and such boundaries] I claim as my domain by the law of the Quirites. To determine this question I challenge you to leave the court and join hands with me upon the ground. The question which you challenge me to determine by leaving the court and joining hands with you, that question I in turn challenge you to determine by a meeting on the ground. I command you both to go to the ground with your respective witnesses. Proceed. Return. Now that we meet in the presence of the praetor, will you state what is the foundation of your claim?'

What was the exact nature of the manuum consertio? The words of Aulus Gellius are as follows: Vindicia, id est, correptio manus in re atque in loco praesenti, apud Praetorem ex duodecim tabulis fiebat, in quibus ita scriptum est, Si qui in jure manum conserunt. Sed postquam praetores, propagatis Italiae finibus, . . . proficisci vindiciarum dicendarum causa in longinquas res gravabantur, institutum est . . . ut litigantes non in jure apud praetorem manum consererent, sed ex jure manum consertum vocarent, ... atque profecti simul in agrum de quo litigabatur, terrae aliquid ex eo, uti unam glebam, in jus in urbem ad praetorem deferrent, et in ea gleba tanquam in toto agro vindicarent, Aulus Gellius, 20, 10. From the conclusion of this passage we might suppose that the manuum consertio was the joint seizure of the object claimed which Gaius describes in the case of movables; but from the definition of vindicia in the commencement, manus correptio in re atque in loco praesenti, 'grasping the hand on or over the subject claimed,' the object grasped seems to have been the hand of the adversary. A similar ceremony formed a portion of the process of Wager of battle in the old English law. 'When the tenant in a Writ of Right pleads that he hath more right to hold than the demandant hath to recover, and offers to prove it by the body of his champion, which tender is accepted by the demandant . . . a piece of ground is in due time set out, of sixty feet square, enclosed with lists, and on one side a court erected for the judges of the court of Common Pleas, who attend there in their scarlet robes; and also a bar is prepared for the learned sergeants at law. . . . When the champions, armed with batons, arrive within the lists

or place of combat, the champion of the tenant takes his adversary by the hand [manuum consertio] and makes oath that the tenements in dispute are not the right of the demandant, and the champion of the demandant then taking the other by the hand swears in the same manner that they are: so that each champion is or ought to be thoroughly persuaded of the truth of the cause he fights for. Next, an oath against sorcery and enchantment is to be taken by both the champions. . . . The battle is then begun,' Blackstone, 3, 22. If we rely on this parallel the manuum consertio was the oath or pledge (δεξίωμα) that each party believed in the justice of his cause. The jusjurandum of the later law, which permitted either party to refer the decision of a dispute to the oath of his opponent, would be a derivative from the sacramentum or the still older process from which the sacramentum descended; consisting of one half of the process, the appeal to religious sanctions (manuum consertio), and omitting the other half, the subsequent duel. It must be confessed, however, that none of our authorities allude to the oath (jusjurandum) having formed a part of the procedure by sacramentum.

Is it possible, when we consider the common Aryan descent of the Romans and our Teutonic ancestors, to suppose any connection between these forms of Roman and Teutonic litigation? Or was manuum consertio merely a symbolic battle, an idle reminiscence of a process belonging to a period anterior to the existence of public tribunals, the period of Self-help, when the remedy of the litigant was to redress his wrongs by the prowess of his own right hand? Or was manuum consertio, like Deductio and Vis ex conventu, 4 § 170, a fictitious trespass, necessary as a basis for penal proceedings by Sacramentum? Or was it merely a means of identifying the subject of litigation?

§ 16. The specification of the title or ground of claim (expressio causae) in a real action (secundum suam causam sicut dixi) was probably limited to actions where the subject claimed was a person, and was then designed to distinguish whether the person was claimed as a son, wife, bondsman (mancipium), or slave. See p. 114. Perhaps, however, it was universally required in Statute-process though not in the formulary system, p. 189.

CONDICTIO.

§ 18. Et haec quidem actio proprie *condictio* vocabatur. nam actor adversario denuntiabat, ut ad iu-

§ 18. And this action was appropriately called condictio (notice), for the plaintiff used to give notice

dicem capiendum die XXX. adesset. nunc vero non proprie condictionem dicimus actionem in personam *esse*, *qua* intendimus dare no*bis* oportere: nulla enim hoc tempore eo nomine denuntiatio fit.

to the defendant to appear before the praetor on the thirtieth day to receive a judge. The name is now applied with less propriety to a personal action by which we sue for a transfer of property, for notice forms no part of the procedure.

§ 19. Haec autem legis actio constituta est per legem Siliam et Calpurniam: lege quidem Silia certae pecuniae, lege vero Calpurnia de omni certa re.

§ 19. This form of statute-process was created by the lex Silia and lex Calpurnia, being prescribed by the lex Silia for the recovery of a certain sum, and extended by the lex Calpurnia to the recovery of a certain thing.

§ 20. Quare autem haec actio desiderata sit, cum de eo quod nobis dari oportet potuerimus sacramento aut per iudicis postulationem agere, valde quaeritur.

§ 20. Why a new action was needed, when transfer of property could be demanded either by Sacramentum or by Judicis postulatio, is canvassed.

After completing his account of Sacramentum, Gaius proceeded to explain the nature of Judicis postulatio. Of its process we have a fragment in the formula, Te, Praetor, judicem arbitrumve postulo uti des, 'I pray you, Praetor, to appoint an arbiter or judge.' It was apparently the prototype of actions ex fide bona, that is, of actions which required an equitable balancing of opposite claims, and an assessment by the judex of the damages, if any, due to the plaintiff. The actions Finium regundorum, Familiae herciscundae, Aquae pluviae arcendae, Vindiciae falsae, which are mentioned in the Twelve Tables, appear to have been tried by an arbiter or arbiters, that is, to have been forms of Judicis postulatio.

The Condictio was unknown to the Twelve Tables, having been created by the lex Silia about B. C. 244, and extended by the lex Calpurnia about B. C. 234. Its distinctive feature appears to have been the sponsio and restipulatio, § 13, a wager or verbal contract conditioned for the forfeiture by the vanquished party of one third of the sum in dispute, in addition, on the part of the defendant, to the original debt. The stake or penalty is called by Cicero legitima pars, 'statutable sum:' Pecunia petita est certa; cum tertia parte sponsio facta est. . . . Pecunia tibi debebatur certa quae nunc petitur per judicem, in qua legitimae partis sponsio facta est, Pro Roscio, 4, 5: whence we may infer that it was fixed by the lex Silia, the statute which created the procedure by condictio.

At this period the Sacramentum would be practically confined to

Real actions before the Centumviral Court: Condictio would be the appropriate Personal action for recovering a certain sum or thing due upon a unilateral contract, real (mutuum), verbal (stipulatio), or literal (expensilatio); and Judicis postulatio the appropriate Personal action for recovering an uncertain sum due on a bilateral contract, and enforcing obligations to perform (facere) rather than to convey.

The gist (gîte) of the civil action of Condictio, i. e. the circumstance whereon it lay, the title or ground of action, was the increase of the defendant's fortune or patrimony by the reduction of the plaintiff's patrimony without any consideration or equivalent gain to the plaintiff. This disturbance the law restored. The simplest, and probably the earliest, instance of the principle was mutui datio. Here the defendant's wealth is increased and that of the plaintiff diminished by a voluntary act of the plaintiff; but the principle equally covers cases where the relation is not knowingly and intentionally initiated by the plaintiff, e. g. payment by mistake (solutio indebiti) and failure of consideration (causa data, causa non secuta). From mutui datio, or actual loan, the Condiction was extended to Expensilatio and Stipulatio, both of which, probably, were imaginary loans, that is, pacts solemnized and fortified by the fiction of a loan. We are expressly informed that this was the case with Expensilatio, 2 § 129, and from etymology (stips= pecunia) and the analogy of Nexum (a fictitious weighing out of bars of bronze), we may conjecture the same of Stipulatio.

The introduction of actions stricti juris is probably of more ancient date than the introduction of actions based on bona fides; the necessity, that is, of applying the power of the State to enforce the class of obligations pursued by Condictio was earlier felt than the necessity of compelling men to perform their so-called obligations ex fide bona. From the antithesis of strictum jus and bona fides it might be imagined that trust, confidence, credit, reliance on good faith, were entirely foreign to civil obligations, and were only ingredients in equitable obligations. This is the reverse of the truth. Greater confidence (fides) is involved in mutui datio, greater risk is incurred by the obligee, who starts by alienating his property and making it the property of the obligor, who denudes himself, that is, of the remedy of vindicatio, than in any other contracts, most of which leave the promisee, even before the invention of personal actions, armed, if need be, with the legal remedy of vindicatio. Other contracts we can imagine left to the protec-

tion of the moral code, to the forum of conscience, to the sanction of public opinion, at a time when it was felt that the immense confidence implied in a loan for consumption could only exist under the aegis of positive law.

When the short, sharp, and decisive remedy of a civil action had once been invented for mutui datio, the ingenuity of contracting parties and jurists would soon extend the remedy to other relations by means of a fiction of mutui datio. Expensilation, then, and Stipulation may be regarded as artifices for transferring conventions, originally perhaps, from the ethical code to the legal code; but certainly, in later times, from the laxer equitable code to the more rigorous civil code. A great part, however, of human dealings refuses to be governed by pre-determined conditions, and pre-arranged, pre-capitulated stipulations. Hence alongside of stipulatio and expensilatio existed Real and Consensual contracts; alongside of Condictio existed Judicis arbitrive postulatio; alongside of formulae stricti juris existed formulae ex fide bona.

The general difference between actiones stricti juris and actiones ex fide bona consisted in the greater latitude of discretion allowed to the judge in the latter. The principal specific points of difference were the following:

(*a*) Actiones stricti juris are based on unilateral contracts, which only ground an action for one of the parties: actiones ex fide bona are based on bilateral contracts, on which both parties can bring actio directa; or on semi-bilateral contracts, on which one party can bring actio directa, and the other actio contraria. So one-sided were condictions or actions stricti juris that before the time of Marcus Aurelius a set-off or counterclaim of the defendant (compensatio) could not be pleaded even in the form of Exceptio. Inst. 4, 6, 30.

(*b*) Actions stricti juris are governed by a literal interpretation of the words of a disposition: in actions ex fide bona the judge inquires what was the true intention of the parties; he attends not only to express but also to implied terms of a convention, Dig. 3, 5, 7, and, to ascertain these, takes notice of local usages, Dig. 21, 1, 31, 20. As we distinguish between the Volition or overt act of a delinquent and his Intention, so bona fides distinguishes between the expressions of contractors or the lawgiver and their intentions. Strictum jus adheres to a grammatical or literalistic interpretation of a disposition, and assumes that words exactly correspond to intentions. It is then called summum jus: e.g. Verbis et literis et summo jure contenditur, Cicero.

(*c*) The ground to support any given condictio or actio stricti juris is precisely defined: whereas an actio ex bona fide, e.g. an actio empti or venditi, cannot only be brought on the principal contract —emptio venditio—for which it is appropriate but also on any accessory conventions (pacta adjecta) and on any attendant circumstances of fraud (dolus) or intimidation (metus). In the later law, however, contemporaneous conventions were treated as integral portions of the contracts of jus strictum: Pacta incontinenti facta stipulationi inesse creduntur, Dig. 12, 1, 40. Accordingly interest as well as principal could be recovered in an action (incerti condictio) on a stipulatio to pay a certain sum with an annexed convention to pay interest at a certain rate. In the same way accessory conventions coalesced into a single contract when annexed to a loan: Omnia quae inseri stipulationibus possunt, eadem possunt etiam numerationi pecuniae et ideo et conditiones, Dig. 12, 1, 7. In the case of a loan of money, however, interest could not be recovered on a contemporaneous convention because the only action a loan of money could support was condictio certi: on a loan of any other quantitas but money, interest could be recovered because the action such a contract would support was condictio incerti, Cod. 4, 32, 23. Savigny, § 268.

(*d*) The Defence in an actio stricti juris could only allege matters which ipso jure extinguished or annihilated a claim (e.g. solutio, acceptilatio, novatio), or, if they founded a counter-claim of the defendant, had been disclosed to the praetor in the preliminary pleadings (in jure) in the form of an exceptio: whereas the arbiter who tried an actio ex bona fide could consider any counter-obligations of the plaintiff even when they were averred for the first time in the course of the trial: Exceptio doli bonae fidei judiciis inest, Dig. 23, 3, 21.

(*e*) In respect of the accessions (omnis causa) in which a defendant was condemned, namely fructus and usurae, there was a difference between actiones stricti juris and ex bona fide: in the former the defendant was only liable to pay these from the date of Litis contestatio; whereas in the latter he was liable from the date of Mora, 2 § 280.

(*f*) As all condemnations under the formulary system were in pecuniary damages it was necessary in the event of a condemnation that the thing in dispute should be valued in money. In actions stricti juris the moment fixed for the valuation (aestimatio) was Litis contestatio: in bonae fidei actions the date of valuation was

the date of Condemnatio: In hac actione sicut in ceteris bonae fidei judiciis . . . rei judicandae tempus, quanti res sit, observatur, quamvis in stricti juris judiciis litis contestatae tempus spectetur, Dig. 13, 6, 3, 2. This is so uncontroverted that in another passage which fixes the moment of condemnatio as the moment of aestimatio in a stricti juris action, Dig. 13, 3, 3, we may have little scruple in assuming that condemnatio is a corrupt reading for contestatio. Both in stricti juris and bonae fidei actions if a day was fixed for the performance of a contract, this day was the date of aestimatio: and if a debtor was guilty of Mora, the creditor had his election between Lis contestata and Res judicata respectively and the date of Mora. In an action on Delict the date of Valuation was none of these but the date of the Delict, i. e. the date of the inception of the obligation. Savigny System, § 275.

(*g*) Another difference related to Juramentum in litem, i. e. the plaintiff's sworn declaration of the value of the thing in dispute. When a defendant contumaciously disobeys a judge's order in a certain class of bona fide actions where judgment is preceded by an order (arbitrium) of the judex, namely actiones Arbitrariae, including Real actions and Personal actions brought to obtain Restitutio or Exhibitio; or when by dolus or culpa lata the defendant has disabled himself from obeying the judge's order; then the oath of the plaintiff as to the value of the subject of litigation fixes the amount of damages (aestimatio) in which the defendant will be condemned. Examples of actions brought to recover Restitutio are the actions Depositi, Commodati, Locati, Dotis, Tutelae, Doli, Metus, and the interdict Unde vi. In bonae fidei actions brought to obtain Traditio, e. g. in Emptio Venditio, such juramentum in litem was inadmissible. In condictions or actions stricti juris it was never admissible; except that when the subject of litigation had ceased to exist by the culpa of the defendant, e. g. in the actio legis Aquiliae, and litis aestimatio would otherwise be impossible to the judex, he might use the plaintiff's oath as a subsidiary evidence for ascertaining what was the selling value of the thing that had been destroyed or what therein was the plaintiff's exceptional interest.

(*h*) If performance of a contract was due at a certain place, a bonae fidei action could be brought to recover damages for non-performance at any other forum as well as at the forum of the specified place, whereas a plaintiff who brought an action stricti juris at any other forum than the forum of the place where the contract was to

be executed would have incurred the penalties of Plus petitio: and to avoid this was obliged to bring his action in the form of actio Arbitraria, 4 § 53.

The division of actions into stricti juris and bonae fidei properly speaking only embraces Personal actions founded on contract with a formula in jus concepta: that is to say, Real actions, Personal actions with a formula in factum concepta, Personal actions on delict, Extraordinaria cognitio (cognizance by the praetor without reference to a judex) were neither stricti juris nor ex bona fide. It is probable however that civil delictual actions (the actions furti nec-manifesti and legis Aquiliae) were governed by the rules of actions stricti juris; while Real actions, and actions in factum, and cognitio extraordinaria were governed by the rules of actions ex bona fide. Vangerow, § 139.

MANUS INIECTIO.

§ 21. *Per* manus iniectionem aeque *de* his rebus agebatur, de quibus ut ita ageretur, lege ali*qua* cautum est, velut iudicati lege XII tabularum. quae actio talis erat. qui agebat sic dicebat: QUOD TU MIHI IUDICATUS SIVE DAMNATUS ES SESTERTIUM X MILIA QUAE DOLO *MALO* NON SOLVISTI, OB EAM REM EGO TIBI SESTERTIUM X MILIUM IUDICATI MANUS INICIO; et simul aliquam partem corporis eius prendebat. nec licebat iudicato manum sibi depellere et pro se lege agere; se*d* vindicem dabat, qui pro se causam agere solebat: qui vindicem non dabat, domum ducebatur ab actore et vinciebatur.

§ 21. Manus injectio (arrest) was the form of action prescribed by law in certain circumstances; as, for instance, against a judgment debtor by the law of the Twelve Tables. The procedure was as follows: the plaintiff said, 'Whereas you have been adjudged or condemned to pay me ten thousand sesterces which you fraudulently have failed to pay, therefore I arrest you as judgment debtor for ten thousand sesterces,' and at the same time laid hands on him; and the debtor was not allowed to resist the arrest, or defend himself in his own person, but gave a vindex to advocate his cause, or, in default, was taken prisoner to the plaintiff's house, and put in chains.

§ 22. Postea quaedam leges ex aliis quibusdam causis pro iudicato manus iniectionem in quosd*am* dederunt: sicut lex Publilia in eum *pro* quo sponsor dependisset, *si* in sex mensibus proximis quam pro eo depensum esset non solvisset sponsori pecuniam; item lex Furia de sponsu adversus eum qui a sponsore plus quam virilem partem exegisset; et denique co*m*plures aliae

§ 22. Afterwards Manus injectio was given by various laws against quasi judgment debtors, as by the lex Publilia against the principal whose debt had been paid by his sponsor, unless he indemnified his sponsor within six months from the payment of the debt; by the lex Furia de Sponsu against the creditor who had exacted from one of several sponsors more than his rat-

leges in multis causis talem actionem dederunt.

§ 23. Sed aliae leges ex quibusdam *causis* constituerunt quasdam actiones per manus iniectionem, sed puram, id est non pro iudicato: velut lex *Furia* testamentaria adversus eum qui legatorum nomine mortisve causa plus M assibus cepisset, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex Marcia adversus faeneratores, ut si usuras exegissent, de his reddendis per manus iniectionem cum eis ageretur.

§ 24. Ex quibus legibus, et si quae aliae similes essent, cum agebatur, manum sibi depellere et pro se lege agere *licebat*. nam et actor in ipsa legis actione non adiciebat hoc verbum PRO IUDICATO, sed nominata causa ex qua agebat, ita dicebat: OB EAM REM EGO TIBI MANUM INICIO; cum hi quibus pro iudicato actio data erat, nominata causa ex qua agebant, ita inferebant: OB EAM REM EGO TIBI PRO IUDICATO MANUM INICIO. nec me praeterit in forma legis Furiae testamentariae PRO IUDICATO verbum inseri, cum in ipsa lege non sit: quod videtur nulla ratione factum.

§ 25. Sed postea lege . . . , excepto iudicato et eo pro quo depensum est, ceteris omnibus cum quibus per manus iniectionem agebatur permissum est sibi manum depellere et pro se agere. itaque iudicatus et is pro quo depensum est etiam post hanc legem vindicem dare debebant, et nisi darent, domum ducebantur. idque quamdiu legis actiones in usu erant semper ita observabatur; unde nostris temporibus is cum quo iudicati depensive agitur iudicatum solvi satisdare cogitur.

able share; and by various other laws against various other persons.

§ 23. Other laws gave Manus injectio simple, that is, not to quasi judgment creditors, against certain other persons: as the lex Furia testamentaria against the legatee or donee in contemplation of death who received more than a thousand asses not being included in certain privileged classes; and the lex Marcia compelled usurers to refund by this process.

§ 24. These laws and certain others permitted the defendant to resist arrest and defend himself in person, for the plaintiff could not arrest him as quasi judgment debtor, but, after naming his cause of action, said simply, 'I therefore arrest you;' whereas, if he proceeded as quasi judgment creditor, after naming the cause he said, 'Therefore I arrest you as quasi judgment debtor.' I am aware that in proceeding under the lex Furia testamentaria the plaintiff added the words, 'As quasi judgment debtor,' though they are not inserted in the law; but I believe that this could not be justified.

§ 25. In more recent times the lex . . . permitted all defendants sued by manus injectio, except the judgment debtor and the principal indebted to his sponsor, to resist arrest and defend themselves in person. Accordingly, the judgment debtor and principal indebted to his sponsor had to give a vindex or were taken to prison as long as statute-process was in force, and at the present day must give bail for the payment of the sum in which they may be condemned.

For the proceedings in Manus injectio see 3 § 77, com.

Manus injectio seems to have had two meanings:

(1) Self-help, or redress of the plaintiff by his own act, when his

right was incontestable and the defendant submitted. We certainly find manus injectio spoken of by non-juristic writers as an act of self-redress: e.g.

Injiciam dominas in mea jura manus, Ovid, Am. 2, 4.

Clamarem, Meus est, injiceremque manus, Ovid, Her. 12.

In this case the award of a magistrate (addictio) would not be a necessary preliminary to abduction (secum duci): but self-redress was a remedy only tolerated when society was very loosely consolidated; and abductio without preceding addictio must at an early period have become illegal. The final blow struck by the state at Self-redress was the constitution of the three emperors, A.D. 389, p. 466.

(2) Manus injectio ceased to be a mere act of self-redress, and became the first stage of a statute-process (legis actio) whenever a Vindex interposed, or, in manus injectio pura, whenever the alleged debtor became defendant in an action, Ihering, 11, c.

In explaining the nature of Nexum, p. 363, I have assumed with Savigny, that Manus injectio implied a preceding Condictio in which the debtor became judicatus. The necessity of this preliminary Condictio, however, is not admitted by Huschke: and certainly the statutes which introduced Manus injectio pro judicato and Manus injectio pura seem to have intended that Manus injectio should be the procedure in the first instance without any antecedent Condictio or Sacramentum.

There are many allusions in history to the private gaols of the usurers; e.g. An placeret, fenore circumventam plebem, potius quam sorte creditum solvat, corpus in nervum ac supplicia dare: et gregatim quotidie de foro addictos duci, et repleri vinctis nobiles domos, et ubicunque patricius habitet, ibi carcerem privatum esse [B.C. 366], Livy, 6, 36. 'Was it well that the commons, overwhelmed with usury, instead of paying the capital, should surrender their bodies to the stocks and torture; that herds should daily be dragged from the forum to servitude; that noble houses should be crowded with men in chains, and every patrician mansion should be a private prison?' Zeno (A.D. 490) calls the detention of a man in a private prison 'nefandissimorum hominum arrogantia'—'nefandissimum scelus,'—and says that it had long been unlawful. He makes it high treason, and punishable with death. Governors of provinces who fail to enforce the law are declared guilty of high treason, Codex, 9, 5.

§ 22. The lex Furia de sponsu (3 § 121), supposed to have been passed in B.C. 95, limited the obligation of the sponsor and fidepromissor to two years, and divided it equally among all the sponsores and fidepromissores without regard to their solvency.

The word exegissent suggests that the lex Furia de sponsu was not a lex perfecta;—that the limitation of the sponsor's liability to a proportionate part of the principal debt was only effected by a penalty being imposed on the creditor who exacted the whole obligation.

If we assume with Ihering that the lex Furia de sponsu and the lex Furia testamentaria were separate clauses of the same enactment, we can understand why manus injectio pro judicato, which was expressly made the remedy in lex Furia de sponsu, was extended by interpretation to lex Furia testamentaria: although this extension, according to Gaius, § 24, violated the rules of statute-process, which ought to rest in its minutest details on the express provisions of a statute.

The lex Marcia is supposed to have been passed between B.C. 200 and B.C. 100. Its poena, like that of lex Furia testamentaria, was quadruplum, Cato de Re Rustica, quoted by Gellius. Penal actions maintainable by a common informer, were called Populares; and the informer, from the amount of the penalty, was called Quadruplator.

Some hold that execution and proceedings in bankruptcy in the old Roman law were always directed immediately against the person of the debtor; execution against his property, under the name of Bonorum venditio, 3 § 77, being a later invention. Savigny, however, whose view I have adopted, supposes that execution against the person was confined with certain exceptions to judgments on an actual loan of money, and that execution on other judgments was always against the estate: and this view, as we have seen, throws light on an obscure problem, the nature of the ancient contract of Nexum, and renders intelligible the Sc. Macedonianum.

The cases, other than a judgment debt, in which the creditor might proceed by Manus injectio seem to be, besides those mentioned in the text, (1) Furtum manifestum, 3 § 189;

(2) Resistance to in jus vocatio; Si calvitur pedemve struit, manum endo jacito, Fragment of the Twelve Tables. 'If the defendant on being summoned to appear before the magistrate tergiversates or attempts to flee, the plaintiff may proceed to Manus injectio.'

We may conjecture also that avoidance of in jus vocatio by

latitation or keeping house rendered a defendant liable to manus injectio. Such is the probable explanation of two fragments of the Twelve Tables: Si in jus vocat, ni it, antestator, igitur em capito.... Cui testimonium defuerit, is tertiis diebus ob portum obvagulatum ito. 'On a service of summons to appear before the magistrate, if the defendant refuse obedience, the plaintiff shall obtain attestation of the fact, and then take him by force. In default of such attestation (i.e. if the defendant avoid service by keeping out of the way) the plaintiff on three market-days shall stand before the defendant's door and wawl (loudly summon him to appear (?), and after this the defendant shall be liable to manus injectio).' [Compare the Hindoo custom of 'sitting d'harna,' i.e. fasting at the door of a debtor. Maine's Early History of Institutions].

(3) Forfeiture of the condition of the solemn contract called Nexum. This was a symbolic contract based on the fiction of a money loan (mutuum), and on condemnation in a Condictio, or, possibly, on mere default in performance the debtor fell into the position of a defendant (pro judicato) who has suffered judgment on a money loan.

(4) Damnum injuria under lex Aquilia,

(5) and Legatum per damnationem. See 4 § 171, com.

With liability to Manus injectio for a quasi judgment debt we may compare the arrest of an absconding debtor in the English law by a writ of capias ad respondendum. As the Roman debtor had to find a vindex or responsible representative, so the English debtor must either remain in custody or put in bail, that is, find sureties who will undertake that, if judgment is obtained against him, either he shall surrender into custody, or shall pay the debt and costs recovered, or that they themselves will pay them for him. The Roman Vindex apparently became responsible for twice the amount of the original debt.

PIGNORIS CAPIO.

§ 26. Per pignoris capionem lege agebatur de quibusdam rebus moribus, *de quibusdam* lege.	§ 26. Pignoris capio (distress) was introduced in some cases by custom, in others by law.
§ 27. Introducta est moribus rei militaris. nam propter stipendium *l*icebat militi ab eo qui distr*ib*uebat, nisi daret, pignus capere: dicebatur autem ea pecunia quae stipendii nomine dabatur aes militare. item	§ 27. By custom, in obligations connected with military service; for the soldier could distrain upon his paymaster for his pay, called aes militare; for money to buy a horse called aes equestre; and for

propter eam pecuniam licebat pignus capere ex qua *equus* emendus erat: quae pecunia dicebatur aes equestre. item propter eam pecuniam ex qua hordeum equis erat conparandum; quae pecunia dicebatur aes hordiarium.

money to buy barley for his horse called aes hordearium.

§ 28. Lege autem introducta est pignoris capio velut lege XII tabularum adversus eum qui hostiam emisset, nec pretium redderet: item adversus eum qui mercedem non redderet pro eo iumento quod quis ideo *lo*casset, ut inde pecuniam acceptam in da*p*em, id est in sacrificium *im*penderet. item lege . . . toria data est pignoris captio publicanis vectigal*ium* *pub*licorum populi Romani adversus eos qui aliqua lege *vectigalia* deberent.

§ 28. The law of the Twelve Tables rendered liable to distress on default of payment the buyer of a victim and the hirer of a beast of burden lent to raise money for a sacrifice. The lex praediatoria gave the power of distress to the farmers of the public revenue.

§ 29. Ex omnibus autem istis causis certis verbis pignus capiebatur; et ob id plerisque placebat hanc quoque actionem legis actionem esse. quibusdam autem *non* placebat: primum quod pignoris captio extra ius peragebatur, id est non aput Praetorem, plerumque etiam absente adversario, cum alioquin ceteris actionibus non aliter uti poss*ent* quam aput Praetorem praesente adversario: praeterea nefa*s*to quoque d*ie*, id est quo non licebat lege agere, pignus capi poterat.

§ 29. As in all these cases the distreinor used a set form of words, the proceeding was generally considered a form of statute process. Some, however, held otherwise, because it was performed in the absence of the praetor and generally of the debtor; whereas, the other forms of statute process could only be enacted in the presence of the praetor and the adversary; besides, it could take place in the juridical vacation (2 § 279), that is, in days unavailable for statute process.

Distress in English law bears a certain resemblance to Execution. Each is the application of constraint to a defendant's will by seizure of his goods. But making a distress is the act of a private person, and precedes the commencement of an action: execution follows after judgment obtained in an action, and is the act of the executive at the command of the sovereign. The pignoris capio of the older Roman law corresponded to distress; the pignoris captio of the formulary system generally was a mode of execution.

Perhaps pignoris capio, like manus injectio, was originally an act of Self-redress, and did not amount to legis actio unless it led to a suit in which the distreinor was plaintiff.

Pignoris capio in the older system was a remedy allowed in cases of a public character, that is, in claims relating to military service, to religion, or to the revenue. In the first case the remedy was established by custom, that is, was anterior to the Twelve Tables; in the second case it was given by the Twelve Tables; in the third case it was created by law subsequent to the Twelve Tables.

We have mention of the aes hordearium, § 27, in Livy's account of the Servian constitution: Ad equos emendos dena millia aeris ex publico data et, quibus equos alerent, viduae attributae, quae bina millia aeris in singulos annos penderent, Livy 1, 43. 'Each soldier received ten thousand asses for the purchase of a horse, and for its maintenance a widow was assigned, who was bound to pay two thousand asses a year.'

The institution appears to have been transplanted from Greece. Cicero mentions it as in force at Corinth: Deinde equitatum ad hunc morem constituit, qui usque adhuc est retentus. Atque etiam Corinthios video publicis equis assignandis et alendis orborum et viduarum tributis fuisse quondam diligentes, De Republica, 2, 20. 'Tarquinius Priscus instituted the present organization of the cavalry. At Corinth, whence he came, there was a practice of allotting horses at the public expense and taxing the childless and widows for their maintenance.' The private persons thus appointed military paymasters appear to have been called tribuni aerarii, Gellius 7, 10. In later times soldiers were paid by the Quaestors from the public treasury.

We have something similar in the Laws of Plato: περὶ δὲ . . . . λειτουργιῶν, ὁπόσα περὶ θυσίας εἰρηνικῆς ἢ πολεμικῶν εἰσφορῶν εἵνεκα, πάντων τῶν τοιούτων τὴν πρώτην ἀνάγκην ἰατὴν εἶναι τῆς ζημίας τοῖς [δὲ] μὴ πειθομένοις, ἐνεχυρασίαν τούτοις οἷς ἂν πόλις ἅμα καὶ νόμος εἰσπράττειν προστάττῃ, τῶν δὲ ἀπειθούντων ταῖς ἐνεχυρασίαις πρᾶσιν τῶν ἐνεχύρων εἶναι, τὸ δὲ νόμισμα γίγνεσθαι τῇ πόλει, Laws, 12, 4. 'If a public duty relating to religion or war is unperformed, the first stage of constraint shall be defeasible of penality by submission of the defaulter, and his goods shall be merely taken in distress by the lawfully appointed official; but if he continue contumacious, the distress shall be sold and the proceeds shall be confiscated.'

§ 28. Raising money for a sacrifice by letting out a beast of burden seems such an exceptional circumstance that we may conjecture it was only a fictitious averment permitted for the purpose of grounding an action. Compare the fictitious averment, permitted

for the purpose of grounding the jurisdiction of the court of Exchequer that the plaintiff was the king's debtor and, by reason of the defendant's default, was unable to pay his debt to the king.

A praediator is defined by Gaius, qui mercatur a populo, above, 2 § 61. Cicero speaks of jus praediatorium, Pro Balbo, 20. A lex praediatoria is mentioned by Suetonius: Ad eas rei familiaris angustias decidit, ut cum obligatam aerariis fidem liberare non posset, in vacuum lege praediatoria venalis pependerit sub edicto praefectorum, Claudius 9. 'He was so impoverished, that he could not discharge his obligation to the treasury, and his goods were declared vacant by the lex praediatoria, and advertised for sale by the edict of the prefects.'

DE FICTIONIBUS.

§ 30. Se*d* istae omnes legis actiones paulatim in odium venerunt. namqu*e* ex nimia subtilitate veterum qui tunc iura condiderunt eo res perducta est, ut vel qui minimum errasset *litem* perderet. itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones effectumque est, ut per concepta verba, id est per formulas litigaremus.

§ 31. Tantum ex duabus causis permissum est lege agere: damni infecti, et si centumvirale iudicium fit. proin*de* vel *hod*ie cum ad *c*entumviros itur, ante lege agitur sacramento aput Praetorem urbanum vel peregrinum. propter damni vero infecti nemo vult lege agere, se*d* potius s*tipula*t*ion*e quae in edicto proposita est obligat adversarium *per magistratum*, quod *et* commodius ius *et* p*l*enius est. per pignoris [*desunt* 24 *lin.*] apparet.

§ 32. Item in ea forma quae publicano proponitur talis fictio est, ut quanta pecunia olim, si pignus

§ 30. But all these branches of statute process fell gradually into great discredit because the excessive literalism of the ancient jurists made the slightest error fatal; and they were abolished by the lex Aebutia and the two leges Juliae, which introduced in their stead the system of formulas or variable written instructions of the praetor to the judex.

§ 31. Two cases only were reserved for statute process, apprehended damage and centumviral causes. The latter are still preceded by statute process of sacramentum before the praetor urbanus or peregrinus, as may happen. For protection against apprehended damage a plaintiff no longer resorts to statute process, but with the aid of the [municipal] magistrate [who in this matter for the sake of celerity exercises as delegate the jurisdiction of the praetor, Dig. 39, 2, 1] stipulates to be indemnified by the defendant in the manner provided by the edict, whereby he is put to less trouble and obtains ampler redress.

§ 32. The formula provided for the farmer of the revenue directs the debtor to be condemned in the

captum esset, id pignus is a quo captum erat, luere deberet, tantam pecuniam condemnetur.

sum for which formerly, after seizure of his goods, he would have had to ransom the distress.

§ 33. Nulla autem formula ad condictionis fictionem exprimitur. sive enim pecuniam sive rem aliquam certam de*b*itam nobis petamus, eam ipsam dari nobis oport*e*re intendimus; nec ullam adiungimus condictionis fictionem. itaque simul intellegimus eas formulas quibus pecuniam aut rem aliquam nobis DARE OPORTERE intendimus, sua vi ac potestate valere. eiusdem naturae sunt actiones commodati, fiduciae, negotiorum gestorum et aliae innumerabiles.

§ 33. No formula is moulded on a hypothetical condictio; for when we sue for a certain thing or sum of money, our intentio names the very thing or sum for which we sue, without any reference to an imagined condictio: so that the modern condictio is not based on the ancient statute process. Similarly independent of the elder system are the actions of Loan for use, Trust, Unauthorized Agency, and innumerable others.

§ 34. Habemu*s* ad*h*uc alterius *etiam* generis fictiones *in* quibusdam formulis: velut cum is qui ex *edicto* bonorum possessionem p*etiit* ficto se herede agit. cum enim praetorio iure e*t* non legiti*mo* succedat in locum defuncti, non ha*b*et dire*ctas* actiones, et neque id quod defuncti fuit potest intendere suum *esse*, *neque id quod defuncto de*bebatur potest intendere *dare sibi* oportere; i*t*aque *ficto* se herede intendit veluti *hoc* mo*do*: IUDEX ESTO. SI AULUS AGERIUS, id est ipse actor, *LUCIO TITIO* HERES *ESSET*, TU*M* SI *PARET* FUNDU*M* DE QUO AGITUR EX IURE QUIRITIUM *EIUS* ESSE *OPORTERE*; vel si i*n personam a*gatur, praeposita simili*ter f*ictio*ne illa* ita subicitur: TUM SI PARET NUMERIUM NEGIDIUM AULO *AGERIO* SESTERTIUM X MILIA DARE OPORTERE.

§ 34. The other kind of fiction is employed when the bonorum possessor or praetorian successor is feigned to be civil heir. Being only the praetorian, not the legal, successor, he has no direct action, and can neither claim to be proprietor of the things belonging to the deceased, nor to be obligee of the debts due to him. Accordingly, the intentio supposes him to be civil heir, and runs as follows: 'Let C D be judex. Supposing Aulus Agerius (plaintiff) were the civil heir of Lucius Titius, if in that supposition it be proved that the land in question ought to be his by the law of the Quirites;' or, if the action is personal, 'if in that supposition it be proved that Numerius Negidius (defendant) ought to pay to Aulus Agerius ten thousand sesterces; then let the defendant be condemned,' &c.

§ 35. Similiter et bonorum emptor ficto se herede agit. se*d* interdum et alio modo agere solet. nam ex persona eius cuius bona emerit sumpta intentione convertit condemnationem in suam personam, id est ut quod illius esset vel illi dare oporteret, eo nomine adversarius huic condemnetur: quae species ac-

§ 35. So the purchaser of a bankrupt's estate may either suppose himself to be civil heir, or may use a different form: he may name the insolvent in the intentio and himself in the condemnatio, requiring the defendant to restore or pay to himself any property that belonged or any debt that was due

tionis appellatur Rutiliana, quia a Praetore Publio Rutilio, qui et bonorum venditionem introduxisse dicitur, comparata est. superior autem species actionis qua ficto se herede bonorum emptor *agit* Serviana vocatur.

to the insolvent. This form of action is called Rutilian from the praetor Rutilius who invented execution in bankruptcy against the estate: the action wherein the plaintiff feigns himself civil heir is called Serviana.

§ 36. *Eiusdem generis est quae Publiciana vocatur.* datur autem haec actio ei qui ex iusta causa traditam sibi rem nondum usucepit eamque amissa possessione petit. nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usucepisse, et ita, quasi ex iure Quiritium dominus factus esset, inten*dit* hoc modo: IUDEX ESTO. SI QUEM HOMINEM AULUS AGERIUS EMIT, ET IS EI TRADITUS EST, ANNO POSSEDISSET, TUM SI EUM HOMINEM DE QUO AGITUR EIUS EX IURE QUIRITIUM ESSE OPORTERET et reliqua.

§ 36. Of the same nature is the Publician action, whereby a man claims a thing which had been delivered to him for a just consideration and of which he lost possession before he had acquired property by usucapion. Being unable to call it his property by the law of the Quirites, he is supposed to have acquired it by usucapion and his intentio runs as follows: 'Let C D be judex. Supposing that the slave who was sold and delivered to Aulus Agerius had continued during a year in his possession, if in that case the slave ought to have belonged to Aulus Agerius by the law of the Quirites, then condemn the defendant,' &c.

§ 37. Item civitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi, velut si furtum *faciat* peregrinus *et* cum eo aga*tur*, formula ita concipitur: IUDEX ESTO. SI PARET *OPE* CONSILIOVE DIONIS *HERMAEI LUCIO TITIO* FURTUM FACTUM ESSE PATERAE AUREAE, QUAM OB REM EUM, SI CIVIS ROMANUS ESSET, PRO FURE DAMNUM DECIDERE OPORTERET et reliqua. item si peregrinus furti agat, civitas ei Romana fingitur. similiter si ex lege Aquilia peregrinus damni iniuriae agat aut cum eo agatur, ficta civitate Romana iudicium datur.

§ 37. So an alien is feigned to be a Roman, if he sue or be sued in an action which may justly be extended to aliens. For instance, if an alien is sued for theft, the formula runs as follows: 'Let C D be judex. If it be proved that Dio Hermaeus aided and abetted in the theft of a golden cup belonging to Lucius Titius, for which, if he had been a Roman citizen he would have had to make composition for theft, then condemn Dio Hermaeus,' &c. So if an alien sue for theft or sue or be sued under the Aquilian law for damage to property, he is feigned to be a Roman citizen.

§ 38. Praeterea *a*liquando fingimus ad*versa*rium nostrum *capite* diminutum non esse. nam si ex contractu nobis obligatus obligatave sit et capite deminutus deminutave

§ 38. Again, we may feign that the defendant has not been degraded in status: for if we make a contract with a person who afterwards is degraded in status, as an (indepen-

fuerit, velut mulier per coemptionem, masculus per adrogationem, desinit iure civili debere nobis, nec directo intendere *possumus* dare eum eamve oportere; sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamve actio *ut*ilis, rescissa capitis deminutione, id est in qua fingitur capite deminutus deminutave non esse.

dent) female by subjection to Hand, an independent male by adrogation, he or she ceases by the civil law to be our debtor, and we cannot directly declare in the intentio that he or she is bound to convey. To protect our rights, however, from extinction by the act of another, the praetor grants a fictitious action, rescinding or ignoring the defendant's act and supposing the continuance of his or her original status.

§ 30. The lex Aebutia is supposed to have been passed about 170 B.C. The leges Juliae are supposed to be a lex judiciaria passed by Julius Caesar about 45 B.C., and another lex judiciaria passed by Augustus about 25 B.C. After the legis actiones were abolished as modes of proceeding in civil suits their forms still survived in the ceremonies of Adoption, the manumission of a slave, the emancipation of a son, and conveyance by in jure cessio.

It may be questioned whether Gaius has exactly laid his finger on the deficiency of the system of Statute-process when he alleges its excessive formalism (nimia subtilitas) as the cause of its failure. Its shortcoming was not so much its formalism (the following system was equally formalistic) as (1) its want of safeguards against errors of form and (2) its want of power of expansion.

(1) Though the Formula was perhaps as literally and rigorously interpreted as the form of Statute-process, yet the period at which the Formula was fixed in the Formulary system diminished the danger of the defeat of a rightful claim by an error in the selection of the appropriate form. The formula of an action was not determined till the close of a debate before the magistrate (in jure) in which both parties were assisted by jurists and had disclosed, in part at least, their pretensions, and brought the true issue to light. Statute-process was formal at an earlier stage and from the inception of the proceedings: and the kinds of statute-process were specially characterized and denominated by their first stages even when these were extra-jural or outside the court, as in manus injectio and pignoris capio. In Statute-process an error of form at any of the stages preceding litis contestatio was fatal to the party by whom it was committed. In the Formulary system no litigant could commit

a suicidal error—no form was fixed whereby his claim could be defeated—before the litis contestatio.

(2) A plaintiff had no remedy unless he could show that his case had been contemplated by the legislator: but the legislator had been too much occupied with foreign war and domestic dissension to think of developing the private code. Jurisprudence had been busy in framing such actions as the system admitted; but jurisprudence had little voice and little scope. If the law was silent, if there was any hiatus or casus omissus, jurisprudence was not allowed to fill up the void. The praetor himself had his hands tied and was a mere piece of machinery. The institution of the Formulary process gave an organ to the voice of jurisprudence, and the power of issuing edicts and inventing new forms of action constituted the praetor a second legislator. The enlarged scope given to the conscience of jurisprudence by the new powers of the praetor produced an enlargement of the scheme of remedies such as followed in England from the recognition of the royal conscience as a source of civil legislation and the erection, beside and in addition to the common law courts, of a court of Chancery presided over by the guardian of the conscience of the king. Ihering, § 47.

Conceptae feriae denoted holidays specially appointed by the magistrate, as opposed to feriae stativae: so concepta verba seems to denote the formulas accommodated by the magistrate to the various grounds of litigation, as opposed to the certa verba, § 29, or more immutable formulas prescribed to the litigants in Statute-process by the legislator. The term, then, expresses elasticity.

We may observe by anticipation that the formulary system, after an existence of nearly five hundred years, was brought by the ingenuity of lawyers into the same discredit and experienced the same fate as the system it had displaced. First Diocletian, A.D. 294, made all judicia extraordinaria, that is, required the magistrates to hear and determine all causes themselves, instead of commissioning others to hear and determine them. Placet nobis, Praesides de his causis in quibus, quod non ipsi possent cognoscere, antehac pedaneos judices dabant, notionis suae examen adhibere: ita tamen, ut, si vel propter occupationes publicas vel propter causarum multitudinem omnia hujusmodi negotia non potuerint cognoscere, judices dandi habeant potestatem, Cod. 3, 3. 'Governors of provinces shall themselves determine the causes which they used to refer to inferior judges, unless compelled by

pressure of business or the number of causes to delegate their function.' [Pedaneus judex is the ordinary judex of the Formulary system, as distinguished from the praetor or highest judicial authority. In the latest period the praetor or magistrate judged in person and was denominated judex.] Afterwards Constans, A.D. 342, abolished the necessity of using consecrated terms in any legal act. Juris formulae, aucupatione syllabarum insidiantes, cunctorum actibus radicitus amputentur, Cod. 2, 58. 'Legal formulas with their syllabic snares and pitfalls, are hereby abolished in every procedure.'

§ 31. The proceeding under the edict in Damni infecti was as follows: If A apprehended damage to his property from the downfall of a dilapidated house (aedes vitiosae, ruinosae) belonging to B, he might apply to the praetor and obtain an order that B should promise, with or without sureties according to circumstances, to indemnify A in the event of the accident. If B refused to promise, the praetor by a first decree put A in possession, that is, gave him detention or custody of B's house. If B still refused, the praetor by a second decree gave the property to A, if B was quiritarian proprietor: if B had not the quiritarian property, the praetor gave A the bonitarian property, that is, a usucapion possession which time would convert into quiritarian proprietorship. This remedy, imposing the necessity of indemnifying or surrendering the cause of damage, was an imitation of noxal actions, which compelled the father of a son or owner of a slave or of a beast that had injured a neighbour's property either to make compensation or to surrender the author of the damage.

The proceeding damni infecti nomine by statute-process, from its similarity to the proceeding in aquae pluviae arcendae, may be inferred to have been a form of judicis postulatio.

§ 32. In English law there is a similar reference to an obsolete institution in the case of debtors to the sovereign. By 33 Hen. 8, c. 39, and 13 Eliz. c. 4, persons indebted to the Crown are to incur in certain cases the same liability as if they were bound in a Statute Staple, a form of solemn contract now disused.

§ 34. Gaius appears to have divided Fictions into two classes, those which made a reference from the formulary system to the older system of procedure, and those which made a reference from rights protected by the praetor to rights recognized by the civil law.

The former class were not an extension of the law, but only preserved to a plaintiff the remedies which he otherwise would have lost by the change of procedure when statute-process was abolished. For instance, the fiction of Pignoris capio was employed to preserve unimpaired the rights of the revenue contractor and as a measure for assessing the damages to which he was entitled against a defaulter.

The second class of fictions was an extension or reform of the law, protecting persons whose rights had previously not been recognized, or mitigating the rigours and liberalizing the narrow-mindedness of the ancient barbarous legislation: granting to the bonitarian proprietor by inheritance or purchase the protection enjoyed by the quiritarian proprietor; giving to the alien the redress provided for the citizen, and preserving to the creditor the remedies extinguished by the debtor's diminution of status. In their task of ameliorating the law the praetors proceeded as unobtrusively as possible, by tacit rather than by open legislation, and rather by innovations in the adjective code, to use Bentham's expression, or code of procedure, than in the substantive code. The introduction of the formulary system, giving them authority to create new actions, had virtually invested them with much legislative power. The new actions introduced by the praetor were called actiones utiles. Utiles actiones were either fictitiae or in factum. Let us examine the mode of their operation. The logic of justice as administered in the courts may be regarded as a syllogism, of which the major premiss is the substantive law annexing a certain remedy to certain conditions (to a certain title); the minor premiss the proposition that between the present plaintiff and defendant these conditions are satisfied; and the conclusion, the enforcement of the remedy in favour of the plaintiff by the executive. Let A represent the remedy or sanctioning right, B the conditions or title, C the plaintiff or his facts. (If C represents the defendant, A will represent the sanctioning duties or obligations). The praetor proceeded in two ways, (1) Without or (2) with the use of fiction.

(1) Without expressly asserting the major premiss, B is A, or avowedly introducing a new principle of substantive law, it is clear that he introduced it by implication if he made the conclusion, C is A, follow from the minor premiss, C is B. He did so in granting an actio in factum, one of his most potent instruments, that is, an actio whose intentio in factum concepta, of the form, Si paret .... fecisse, proposed

a single issue of fact; for thus he tacitly introduced a new major premiss, B is A, or converted a rule of equity or public opinion into a principle of substantive law, without any fiction or reference to previous rules.

(2) When he granted a fictitious action, that is, one whose intentio in jus concepta, of the form, Si paret . . . . oportere, admitted issues both of fact and of law, the fiction furnished an exact measure of the extent to which the old law had been abandoned. If the old law is represented by the major premiss, B is A, the praetor might suppress some element, X, of the title B to which the remedy A was annexed; and make the conclusion, C is A, follow from the minor premiss, C is B minus X. The fiction would be the false assumption that C (the plaintiff's case) satisfied the abrogated condition X whenever it was proved to satisfy the remaining elements of B. By ruling that the fictitious proposition, C is X, should not be called in question, and that the defendant should not be allowed to demur to the plaintiff's claim on the ground that X was unsatisfied, the praetor would virtually abrogate the old law, B is A, and substitute for it the new law, B minus X is A. In the cases given by Gaius the condition represented by X relates to succession, usucapio, citizenship, status. It might relate to delivery, contract, alienation, or any other disposition. In the actio Pauliana, protecting creditors against fraudulent alienations, the fiction was an assumption of non-delivery (rescissa traditione). Restitutio in integrum of a minor or person who had acted under constraint of fear might assume the form of a fictitious action which treated the rescinded act as unperformed (rescissa alienatione).

§ 35. The purchaser of a bankrupt's estate, unlike the purchaser at a sectio bonorum, or sale sub hasta of the confiscated goods of a criminal, though a universal successor, only took, in the language of English law, the equitable and not the legal estate. To protect his rights the praetor allowed him to sue in the character of heres, or successor to the legal estate.

The praetor Publius Rutilius may either have been a person who was praetor in 167 B.C., or a person who was consul in 104 B.C. The formula which he introduced was used by the cognitor and procurator, 4 § 86. Before his time, apparently, the lawyers entertained a superstition about a variance between the intentio and condemnatio.

The actio Serviana here mentioned was apparently not the same as the actio Serviana whereby a lessor could recover the goods of a colonus which had been pledged as a security for the payment of rent.

§ 36. A Quintus Publicius is mentioned by Cicero, Pro Cluentio, 45, as praetor in B.C. 66 or shortly before. The actio Publiciana, 2 § 41, was used by the purchaser of a res mancipi who had taken by simple delivery what could only be conveyed by mancipation; or by a grantee from a grantor who was not proprietor. The abolition of the distinction of res mancipi and nec·mancipi and of quiritarian and bonitarian property would render the action unnecessary in the first of these cases and probably in many cases of the second class. In the terms of the edict, Si quis id quod traditur ex justa causa non a domino et nondum usucaptum petet, judicium dabo, Dig. 6, 2, 1, the words 'non a domino,' which limit its application to the second class, were probably intercalated by Justinian. But the action would also be convenient to an actual proprietor who wished to be relieved of the necessity of proving his title.

The form of the actio Publiciana that we have considered proceeds on the supposition of the accomplishment of a non-accomplished usucapio. Some writers, misled by Dig. 44, 35, 7, pr., have imagined the existence of another form of Publiciana, which they call contraria Publicianae or Publiciana rescissoria, proceeding on the supposition that an accomplished usucapio had not been accomplished. But Savigny has shown, § 329, that this is erroneous: that when usucapion is rescinded in Integral Restitution on account of Absence, the action whereby the plaintiff recovers his property may be, according to circumstances, either an ordinary Publiciana or an ordinary Vindicatio, Inst. 4, 6, 5: that the rescission of usucapio, in other words, does not give birth, as supposed, to any new form of action.

§ 38. By a positive rule, of which we are unable to give the rationale [1 § 162, com.], the change of status produced by coemptio and adrogatio extinguished the debts of the wife or adrogatus, and the husband or adrogator acquired by manus and patria potestas their rights without their liabilities. To meet this the praetor gave the creditor an actio rescissoria: Ait praetor: qui quaeve, posteaquam quid cum his actum contractumve sit, capite deminuti deminutaeve esse dicentur, in eos easve quasi id factum non sit judicium dabo, Dig. 4, 5, 2. If the action was not defended by the husband or

adrogator, the praetor gave the creditor missio in possessionem and power of sale against all the property of the wife or adrogatus, Gaius, 3 § 84.

DE PARTIBUS FORMULARUM.

§ 39. Partes autem formularum hae sunt: demonstratio, intentio, adiudicatio, condemnatio.

§ 40. Demonstratio est ea pars formulae quae praecipue ide*o* inseritur, ut demo*n*stretur res de qua agitur. velut haec pars formulae: QUOD AULUS AGERIUS NUMERIO NEGIDIO HOMINEM VENDIDIT. item haec: QUOD AULUS AGERIUS *APUT* NUMERIUM NEGIDIUM *HO*MINEM DEPOSUIT.

§ 41. Intentio est ea pars formulae qua actor desiderium suum concludit. velut haec pars formulae: SI PARET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA DARE OPORTERE. item haec: QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE *OPORTERE*. item haec: SI PARET HOMINEM EX IURE QUIRITIUM AULI AGERII ESSE.

§ 42. Adiudicatio est ea pars formulae qua permittitur iudici rem alicui ex litigatoribus adiudicare: velut si inter coheredes familiae erciscundae agatur, aut inter socios communi dividundo, aut inter vicinos finium regundorum. nam illic *ita est:* QUAN*TUM* ADIUDICARI OPORTET, IUDEX TITIO ADIUDICATO.

§ 43. Condemnatio est ea pars formulae, qua iudi*ci* condemnandi absolvendive potestas pe*r*mittitur. velut haec pars formulae: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET ABSOLVE. item haec: IUDEX NUMERIUM NEGIDIUM AULO

§ 39. The formula is composed of the Demonstratio, the Intentio, the Adjudicatio, the Condemnatio.

§ 40. The principal function of the Demonstratio is to indicate the subject of dispute, as in the following example: 'Whereas Aulus Agerius sold a slave to Numerius Negidius,' or, 'Whereas Aulus Agerius deposited a slave in the hands of Numerius Negidius.'

§ 41. The Intentio expresses the claim of the plaintiff, thus: 'If it be proved that Numerius Negidius ought to convey ten thousand sesterces to Aulus Agerius;' or thus: 'Whatever it be proved that Numerius Negidius ought to convey or render to Aulus Agerius;' or thus: 'If it be proved that the slave in question belongs to Aulus Agerius by the law of the Quirites.'

§ 42. The Adjudicatio empowers the judex to transfer the proprietorship of a thing to one of the litigants, and occurs in the actions for partitioning an inheritance between co-successors, for dividing common property between co-proprietors, and for tracing boundaries between neighbouring landholders. In these the praetor says: 'The portion of the estate that ought to be transferred to Titius, do thou, judex, by thy award transfer to him.'

§ 43. The Condemnatio empowers the judex to condemn or absolve the defendant, thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius ten thousand sesterces; if it be not proved, pronounce his absolution; or thus: 'Do thou, judex,

AGERIO DUMTAXAT *X MILIA* CONDEMNA. SI NON PARET ABSOLVITO. item haec: IUDEX NUMERIUM NEGIDIUM AULO AGERIO [X MILIA] CONDEMNATO et reliqua, ut non adiciatur. . . .

condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding ten thousand sesterces; if it be not proved, pronounce his absolution;' or thus: 'Such a sum do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius,' et cetera, without naming the sum or fixing a maximum.

§ 44. Non *tamen* ist*ae* omn*es* par*tes* simul inveniuntur, sed quaedam inveniuntur, quaedam non inveniuntur. certe intentio aliquando sola invenitur, sicut in praeiudicialibus formulis, qualis est qua *qua*eritur aliquis libertus sit, vel quanta dos sit, et aliae complures. demonstratio autem et adiudicatio et condemnatio numquam solae inveniuntur, nihil *enim* omnino sine intentione vel condemnatione valet; item condemnatio sine [demonstratione vel] intentione [vel adiudicatione] nullas vires habet, *et* ob id numquam solae inveniuntur.

§ 44. These parts are not concurrent, but where some are present others are absent. Sometimes the Intentio is found alone, as in the prejudicial formula to decide whether a man is a freedman, or to ascertain the amount of a dower, or to settle other preliminary inquiries. But the Demonstratio, Adjudicatio, and Condemnatio are never found alone, for the Demonstratio is inoperative without an Intentio and Condemnatio, and the Condemnatio is inoperative without an Intentio (or Demonstratio ?).

§ 39. Besides the four parts mentioned by Gaius the formula always contained a nomination of a judex, and sometimes an exceptio, praescriptio, or arbitrium, accessory parts which will be presently explained.

§ 40. The demonstratio seems not to have occurred in real actions nor in personal actions in factum, but in personal actions in jus, whether founded on contract or on tort, excepting perhaps the condictio certi.

If the contract had a technical name (e.g. depositum, venditio) the demonstratio contained the name (deposuit, vendidit); if the contract was nameless, it was described in the demonstratio by a circumlocution, and the action was called actio praescriptis verbis. That a demonstratio was found in actions ex maleficio appears from Gaius, below, § 60, and from Paulus, Collatio, 2, 6. Sicut formula posita est. Quod Auli Agerii pugno mala percussa est: Illud non cogitur dicere, dextra an sinistra, nec qua manu percussa sit. Ita si dicat infamatum se esse, debet adjicere quemadmodum infamatus sit. Sic enim et formula concepta est: Quod Numerius Negidius libellum (or sibilum) immisit Aulo Agerio infamandi causa. 'As

the formula is worded: Whereas Aulus Agerius was struck on the cheek by the fist: the plaintiff is not compelled to declare whether he was struck on the right or left cheek, or whether with the right or left hand. And if he sue for defamation, he must allege the means, for so the formula is framed: Whereas Numerius Negidius (hissed or) published a libel against Aulus Agerius with the purpose of defamation.'

The absence of a demonstratio in the formula of condictio certi may be inferred from the example given by Gaius, § 86, and from the assertion of Cicero, Pro Roscio Comoedo, 4, that it did not appear whether Fannius, who sued Roscius by condictio certi, founded his claim on mutui datio, expensilatio, or stipulatio. He could hardly have asserted this, if the title on which Fannius sued had been expressed in a demonstratio. On the other hand, we have a demonstratio in the condictio incerti, § 136, § 137. It is obvious that if a man sues for an indeterminate sum of money he ought to give the defendant some further information of the cause of action; but if he sues for a determinate sum or a definite thing, the defendant can scarcely be ignorant of the cause of action on which the plaintiff relies.

§ 42. The adjudicatio was only found in the three actions familiae erciscundae, communi dividundo, and finium regundorum. It was not a declaration of existing property, but a transfer of property to one of the litigants from the other. Adjudicatione dominia nanciscimur . . . nam si judex uni ex heredibus aut sociis aut vicinis rem aliquam adjudicaverit, statim illi adquiritur sive mancipi sive nec mancipi sit, Ulpian, 19, 16. 'Adjudication is a transfer of dominion, for the successor, partner, landowner, to whom a thing is adjudicated by the judex, forthwith acquires property therein, whether it is mancipable or not mancipable.' In quibus tribus judiciis permittitur judici, rem alicui ex litigatoribus ex aequo et bono adjudicare, et, si unius pars praegravare videbitur, eum invicem certa pecunia alteri condemnare, Inst. 4, 6, 20. 'In these three actions the judge has the power to assign a thing on reasonable grounds to one of the litigants, and, if he thus obtain more than his share, to condemn him to make pecuniary compensation.'

§ 43. Taxatio [signified by the word 'dumtaxat'] was a limitation to the condemnatio. Besides the kind noticed by Gaius, there were several others. If a paterfamilias was sued for the debt of a

person in his power whom he had authorized to trade, the condemnation was limited to the amount of the peculium (quatenus in peculio est); if the slave or son had traded without authority, it was limited to the amount of profit the father or master had thereby received (quatenus in rem ejus versum est); if the heir of a wrong-doer or fraudulent debtor was sued, it was limited to the amount that he gained from the wrong or fraud by his succession (dumtaxat in id quod ad eum pervenit).

Again some debtors enjoyed a privilege that is called Beneficium competentiae: the privilege of not being condemned to pay the whole amount of their debt but only such an amount as will leave them the means of subsistence (condemnatio in id quod debitor facere potest). A soldier sued by any creditors; a bankrupt who has made cessio bonorum, sued by his original creditors in respect of after-acquired property; a paterfamilias sued by a creditor for a debt incurred when he was a filiusfamilias; an ascendant sued by a descendant; a husband sued by a wife or a wife by a husband before or after divorce for a debt incurred during marriage; a father-in-law sued by a son-in-law for a promised dower; a donor sued by a donee; a partner sued by a partner; were only liable to be condemned in such a sum as would leave them the necessaries of life. The privilege was enforced by Exceptio [?], Dig. 44, 1, 22. It was forfeited by dolus and did not apply to liabilities arising from delict. If a privileged debtor was condemned in the whole amount of his fortune he could claim to have a deduction for his means of subsistence made in the levy of execution.

The obligation of the privileged debtor, however, was not extinguished until his creditor had received full satisfaction, and any after-acquired property of the debtor was liable to the claims of the creditor. Accordingly, at the period when Res judicata operated either ipso jure or per exceptionem to extinguish a right of action, 3 § 180, it was necessary, in order to preserve the creditor's right of subsequent action for the residue, that the judge, as a condition of allowing the Beneficium competentiae, should compel the debtor to enter into a stipulation on which a subsequent suit could be grounded. At a later period, when Res judicata had lost its power of necessary Novation, it was no longer requisite to exact this cautio from the debtor before he was allowed to enjoy the Beneficium competentiae. Vangerow, § 174.

§ 44. A prejudicium is mentioned, 3 § 123, to try whether a creditor had openly declared to the sureties the amount of the debt and number of sureties; on which facts would depend the several liabilities of each individual.

When Manus had fallen into desuetude, Dos, the contribution of the wife to the expenses of matrimony, became during the subsistence of the marriage tie the property of the husband, 2 § 63, but ceased to be his property at its termination. The law, however, by a partial EXTINCTION of the dower allowed him to retain whatever necessary outlay he had made for its conservation: Impensae necessariae dotem ipso jure minuunt, Dig. 23, 2, 61. If, now, we assume with Ihering that there was a period when every action was required to have an intentio certa, § 50, we can understand the necessity of a praejudicium to ascertain quanta dos sit. For when the divorced wife sued for restitution of her dower, having no means of knowing the amount of her husband's outlay upon it or what portion of his outlay was necessary to its conservation, she would certainly have incurred the penalties of plus petitio, § 53, if she was not allowed to ascertain by a preliminary issue the amount of the dower after deduction of the necessary outlay. See § 115, com.

So when by the lex Falcidia all legacies were proportionally abated until a fourth remained to the heir, it was necessary, in order to enable the legatee to avoid plus petitio, to allow him to ascertain the amount of the inheritance by a preliminary inquiry: Cum dicitur lex Falcidia locum habere, arbiter dari solet ad ineundam quantitatem bonorum, Dig. 35, 4, 1, 6. 'When Falcidia is alleged to be applicable, an arbiter is appointed to ascertain the amount of the inheritance.'

Could a Formula consist solely of a Demonstratio and a Condemnatio? Yes, if Savigny is right in supposing, § 312, that the Praetor sometimes granted a Formula of the following shape:

Quod Aulus Agerius juravit, Numerium Negidium fundum Cornelianum ipsi dare oportere, quanti is fundus est, eum condemna. 'Whereas the plaintiff has sworn that the defendant owes him such and such a thing, do thou, judex, condemn the defendant to pay him its value.'

To explain this we must notice a peculiar use of the oath (jusjurandum) in Roman litigation.

The Teutonic tribes, including our ancestors, allowed a defendant to purge himself by his own oath supported by the oath of a certain

number of his neighbours; of which institution we have a vestige in the Wager of law, which was recently an incident of the action of Detinue, in which the defendant might clear himself by his own oath and that of eleven compurgators. With such principles of Evidence it is not surprising that in the German forests the struggle between litigants was not, who should escape the burden of proof but, who should enjoy the privilege of proof. The Roman method was not so liable to abuse. Either litigant might tender (deferre, delatio) an oath to his adversary, i. e. offer to be concluded by his adversary's oath, on an issue either of fact or of law (obligation, property, succession, &c.). The oath was then equivalent to a judgment in favour of the person by whom it was sworn. If a litigant was prepared to take an oath his adversary might release him from actually swearing (dare, praestare, jusjurandum); but this release (remittere, remissio) was equivalent to an actual oath. Instead of taking a tendered oath, the adversary might make a counter-tender (referre, relatio), i. e. submit the issue to the oath of the original tenderer. To decline either to swear or to make a counter-tender was equivalent to a confession of the party who declined, or to an oath of the party who tendered. From this necessity imposed on the party to whom it was tendered, the oath was called jusjurandum necessarium, Dig. 12, 2, 34, 6. If now on a tender or counter-tender by a defendant a plaintiff swore to the justice of his claim, the assessment of damages (rei aestimatio) would still remain as a question for the judex, and the praetor would give him a formula consisting, as above, of a Demonstratio and a Condemnatio.

CONCEPTIO FORMULARUM.

§ 45. Sed eas quidem formulas in quibus de iure quaeritur *in ius* conceptas vocamus. quales sunt quibus intendimus nostrum esse aliquid ex iure Quiritium, au*t* nobis dare oportere, aut pro fure damnum *decidere oportere; in* quibus iuris civilis intentio est.

§ 45. A formula is framed to embrace an allegation of law when we declare ourselves proprietors by the law of the Quirites, or assert that the defendant is bound to convey to us or to make composition as a thief; for in these and the like cases we appeal to a principle of civil law.

§ 46. Ceteras vero in factum conceptas vocamus, id est in quibus nulla talis intentionis concept*io* est, *sed* initio formulae, nomina*to* eo quod factum *est*, adic*iun*tur ea verba

§ 46. It is framed to contain an allegation of fact when it contains no such appeal; but, after proposing a fact, proceeds at once to the Condemnatio and Absolutio; as in an

per quae iudici damnandi absolvendive potestas datur. qualis est formula qua utitur patronus contra libertum qui eum contra edictum Praetoris in ius vocat; nam in ea ita est: RECUPERATORES SUNTO. SI PARET ILLUM PATRONUM AB ILLO LIBERTO CONTRA EDICTUM ILLIUS PRAETORIS IN IUS VOCATUM ESSE, RECUPERATORES ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA CONDEMNATE. SI NON PARET, ABSOLVITE. ceterae quoque formulae quae sub titulo de in ius vocando propositae sunt in factum conceptae sunt: velut adversus eum qui in ius vocatus neque venerit neque vindicem dederit; item contra eum qui *vi* exemerit eum qui in ius vocatur. et denique innumerabiles eiusmodi aliae formulae in albo proponuntur.

§ 47. Sed ex quibusdam causis Praetor et in ius et in factum conceptas formulas proponit, vel*ut* depositi et commodati. illa enim formula quae ita concepta est: IUDEX ESTO. QUOD AULUS AGERIUS APUT NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUIT, QUA DE RE AGITUR, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET EX FIDE BONA, EIUS IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO, *NISI RESTITUAT*. SI NON PARET, ABSOLVITO—in ius concepta est. at illa formula quae ita concepta est: IUDEX ESTO. SI PARET AULUM AGERIUM APUT NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUISSE EAMQUE DOLO MALO NUMERII NEGIDII AULO AGERIO REDDITAM NON ESSE, QUANTI EA RES ERIT, TANTAM PECUNIAM IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO. SI NON PARET, ABSOLVITO—in factum concepta est. similes etiam commodati formulae sunt.

action by a patron against a freedman for a summons in contravention of the edict. The formula then runs thus: 'Let M N be recuperators. If it be proved that such and such a patron was summoned to appear by such and such a freedman against the edict of such and such a praetor, do you, recuperators, condemn the said freedman to pay to the said patron ten thousand sesterces; if it be not proved, pronounce his acquittal.' The other formulas relating to summonses raise questions of fact, as the formula in an action against a defendant who on service of summons neither appears nor finds a vindex, or against a person who makes a violent rescue of a person summoned to appear, and many other formulas in the praetor's album.

§ 47. Some actions may be instituted by formulas either of law or of fact, as for instance the actions of Deposit and Loan for use. The following formula: 'Let C D be judex. Whereas Aulus Agerius deposited a silver table in the hands of Numerius Negidius, whatsoever it be proved that Numerius Negidius is on that account bound by good faith to convey or render to Aulus Agerius, do thou, judex, condemn Numerius Negidius to convey or render, unless he make restitution; if it be not proved, pronounce his acquittal:' is a formula of law. A formula thus framed: 'Let C D be judex. If it be proved that Aulus Agerius deposited a silver table in the hands of Numerius Negidius, and that by the fraud of Numerius Negidius it has not been restored to Aulus Agerius, do thou, judex, condemn Numerius Negidius to pay Aulus Agerius whatever shall be the value of the table; if it be not proved, pronounce his acquittal:' is a formula of fact. And there is

§ 48. Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnatio concepta est. itaque etsi corpus aliquod petamus, *velut fundum, hominem*, vest*em*, a*urum*, *argen*tum, iudex non ipsam rem condemnat *e*um cum *quo* actum est, sicut olim fieri solebat, [*sed*] aestimata re pecuniam eum condemnat.

§ 49. Condemnatio autem vel certae pecuniae in form*ula* ponitur, vel incertae.

§ 50. Certae pecuniae in ea formula qua certam *pecuniam petimus;* nam illic ima parte for*mu*lae ita *est:* IUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET, ABSOLVE.

§ 51. Incertae vero condemnatio pecuniae duplicem significationem habet. est enim una *cum* aliqua praefinitione, quae vulgo dicitur cum taxatione, velut si inc*er*tum aliquid petamus; nam illic *ima parte f*ormulae ita *est:* *E*IUS, IUDEX, NUMERIUM NEGIDIUM AULO AGERIO DU*MTAXAT* X MILIA CONDEMNA. SI NON PARET, ABSOLVE. *di*versa est quae infini*ta est*, *vel*ut si rem aliquam a possidente nostram esse petamus, id est si in rem agamus, vel ad exhibendum; nam illic i*ta* est: QUANTI *EA* RES *E*RIT *TA*NTAM *P*ECUNIAM *I*UD*EX* NUMERIUM NEGIDIUM *AULO AGE*R*IO* CONDEMNA. SI NON PARET, ABSOLVITO.

§ 52. Qui de re vero est iudex si condemnat, certam pe*cuni*am condemnare debet, etsi certa pecunia in condemnatione posita non sit. debet autem iudex attendere, *ut cum* certae pecuniae condemnatio posita sit, neque maioris neque minoris summa petita condemnet, alioquin litem suam facit. item si taxatio posita sit,

a similar alternative in the case of Loan for use.

§ 48. The condemnatio is always to pay a pecuniary value. Even when we claim a corporeal thing, an estate in land, a slave, a garment, an article of gold or silver, the judex condemns the defendant to deliver not the thing itself, as in the elder system, but its value in money.

§ 49. The formula either names a certain sum in the Condemnatio or an uncertain sum.

§ 50. In a condictio, when it names a certain sum, it concludes as follows: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius ten thousand sesterces; if it be not proved, absolve him.'

§ 51. An uncertain sum is either named with a limitation or maximum, for instance, thus: 'Do thou, judex, for that (or, of that sum) condemn Numerius Negidius to pay Aulus Agerius not more than ten thousand sesterces; if it be not proved, absolve him:' or it is named without a limitation, as when we demand our property from the possessor in a real action, or demand the production of a person or thing in a personal action, where the conclusion runs as follows: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius whatever shall be the value; if it be not proved, absolve him.'

§ 52. But whatever the claim, the judex must condemn the defendant to pay a definite sum, even though no definite sum is named in the condemnatio. When a certain sum is laid in the condemnatio, he must be careful not to condemn the defendant in a greater or lesser sum, else he makes himself liable to damages: and if there is a limi-

ne pluris condemnet quam taxatum sit, alias enim similiter litem suam facit. minoris autem damnare ei permissum est [*desunt 7 fere lin.*]

tation he must be careful not to exceed the maximum, else he is similarly liable; but he may condemn him in less than the maximum.

§ 45. In an action with a formula in factum concepta, the Intentio, Si paret fecisse, 'If it appear that the defendant has done this or that'—'If the defendant's act place him in a certain class,' corresponds to the minor premiss of a syllogism of which the conclusion is: 'Then this defendant is under such and such an obligation to this plaintiff,' or 'This defendant is condemnable to perform such and such a service to this plaintiff.' The major premiss will be: 'All persons who have done such and such an act,' or, 'who belong to such and such a class, are under such and such an obligation,' or 'are compellable to render such and such a service to such and such a plaintiff.' This major premiss is withdrawn from discussion, is not permitted to be disputed; and the issue in such an action can only relate to the minor premiss; in other words, is always an issue of fact.

In an actio with a formula in jus concepta, the intentio, Si paret oportere, 'If it appear that the defendant is under such and such an obligation,' corresponds to the conclusion of a syllogism of which the minor premiss is: 'The defendant belongs to such and such a class:' and the major: 'All persons belonging to such and such a class are under such and such an obligation.' The major premiss may be an alleged rule either of law or of equity, a proposition either of civil law or of praetorian law; and in neither case is it withdrawn from discussion. The issue, that is to say, in an action with a formula in jus concepta may either relate to the minor or to the major premiss: may be either an issue of fact or an issue of law.

The following passage of Cicero speaks of actions whose formula was in jus concepta with the additional terms, ex fide bona or the like; and which therefore involved an issue of equity or praetorian law. Privata enim judicia maximarum quidem rerum in juris consultorum mihi videntur esse prudentia. . . . In omnibus igitur iis judiciis in quibus EX FIDE BONA est additum; ubi vero etiam UT INTER BONOS BENE AGIER; in primisque in arbitrio rei uxoriae, in quo est, QUOD AEQUIUS MELIUS, parati esse debent. Illi enim dolum malum, illi fidem bonam, illi aequum bonum, illi quid socium socio, quid eum qui aliena negotia curasset ei cujus ea negotia fuissent; quid eum qui mandasset eumve cui mandatum esset alterum alteri

praestare oporteret, quid virum uxori, quid uxorem viro, tradiderunt, Topica, 17. 'Private suits of the highest importance turn on the doctrines of the jurist. . . . In all the actions, therefore, where the judge is instructed to look to the requirements of good faith, to the practice of honest men, or, as in the suit of a wife against her husband, to what is good and equal, the jurist should be ready to speak. For he is the authority on what constitutes fraud or good faith, what is good and equal, what are the mutual duties of partners, of principal and agent, whether authorized or unauthorized, of husband and wife.'

Many questions of law were undoubtedly decided at the initial stage of an action, in jure, at the appearance before the tribunal or curule chair of the praetor. At this appearance the parties were attended by counsel (haerere in jure atque praetorum tribunalibus [advocatos] De Oratore, 1, 38); and here, though the praetor would not settle a dispute about facts, many demurrers or simple issues of law or equity might be decided, and the controversy might be terminated without ever reaching the stage of reference to a judex. The praetor, however, had no leisure to determine complicated issues of law or equity, and these were accordingly referred to a judex or arbiter by a formula in jus concepta.

§ 46. According to the Institutes, a man might not summon his patron or parent to appear in an action without the permission of the praetor, under a penalty of fifty solidi, Inst. 4, 16, 3. A solidus or aureus was a hundred sesterces, so that we must either, with Savigny, for ten thousand read five thousand sesterces in the text of Gaius, or suppose that Justinian reduced the penalty to half its original amount.

In the formulary system an appearance of the defendant before the praetor (in jure) was indispensable as the first stage of an action. In English law, after service of summons or proof that all proper means for the service of summons have been used in vain, the court will grant leave to the plaintiff to enter an appearance for the defendant. But in Roman law an original appearance of the defendant at the commencement of the action was indispensable. On service of a summons (in jus vocatio) he was bound either to obey at once and accompany the plaintiff into court, or to send a responsible representative (vindex, § 46) in his stead, or to find security, called cautio judicio sisti (to be thus interpreted: cautio sisti in jure ad judicium ordinandum), for his appearance in jure on

a future day. If he took none of these steps he was liable to an actio in factum, and he might be apprehended and taken by force (duci in jus, Dig. 2, 8, 5); and any person who made a violent rescue was liable to be condemned by actio in factum to pay the amount of the plaintiff's claim, quanti ea res est ab actore aestimata, Dig. 2, 75. At the first appearance in court, after the plaintiff's indication of the action he meant to bring (editio actionis), the defendant was required to give security (vadimonium, or cautio judicio sisti) for his second appearance in court to receive a judex. At the second appearance, after the nomination (addictio) of the judex and the joinder in issue or delivery of the formula (litis contestatio, judicium ordinatum, judicium acceptum), there was (at all events in the legis actiones) an adjournment to the next day but one (comperendinatio), and on this day the trial before the judex (judicium) proceeded. In the formulary system, then, there were two appearances in jure, one in obedience to the in jus vocatio, and a second for the assignment of a judex. In the Libellary system which prevailed in the time of Justinian the former of these appearances was suppressed, and instead thereof the plaintiff by a libellus conventionis sued out from the court a commonitio or summons to the defendant to appear before the court. On the service of this by a public officer the defendant was required to give cautio judicio sisti, security for his appearance for the arrangement of a judicium, and in default thereof was arrested.

§ 47. The lawyer's manual of practice contained alternative formulae for the same ground of action. Sed tamen non parcam operae, et ut vos in vestris formulis, sic ego in epistolis, *de eadem re alio modo*, Cicero ad Familiares, 13, 27. 'However, I will spare no trouble, and as you lawyers do in your books of formulae, I will present you in my correspondence with the same matter in another form.' Quae cum Zeno didicisset a nostris, ut in actionibus praescribi solet, *de eadem re* dixit *alio modo*, De Finibus, 5, 19. 'Zeno learnt this from the teachers of our school, and then, as the headings of the formulae say, handled the same subject in a different form.'

One great advantage of the actiones in factum was that they were available to aliens and filii familiarum. In factum actiones etiam filii familiarum possunt exercere, Dig. 44, 7, 13.

We shall see hereafter that actio in factum differed from actio in jus in respect of (1) Plus petitio and in respect of (2) Novatio.

(1) An actio with a formula in factum concepta, having an in-

tentio–formula–certa, would be capable of plus petitio: while an actio with a formula in jus concepta, though based substantially on the same grounds, having an intentio–formula–incerta, would be incapable of plus petitio, § 60.

(2) Novatio was only produced by Litis contestatio when the formula was in jus concepta, § 107.

The words Nisi restituat are the clause which constitutes a formula arbitraria. In the formulary system the condemnation was always pecuniary; the defendant was always condemned by the judgment to pay the plaintiff a sum of money. By means, however, of the alternative clause in a formula arbitraria the plaintiff could recover a specific thing or enforce a specific performance. Empowered by this clause the judex made a preliminary order (jussus, arbitrium) for the restitution or performance; and if it was obeyed the defendant was absolved, if it was disobeyed the pecuniary condemnation was the penalty of disobedience.

Actiones arbitrariae included Real actions (e.g. vindicatio, publiciana, hereditatis petitio, confessoria, hypothecaria) and such bona fide actions (e.g. depositi, commodati, locati, tutelae, rei uxoriae) and praetorian actions (e.g. doli, metus, interdictum de vi, § 163) as were brought to obtain Restitution. The formula arbitraria, accordingly, could not be used in an actio empti, for though this was a bona fide action, yet the specific performance (traditio) sought to be enforced was not of the nature of a Restitution: nor could the formula arbitraria be employed in actions stricti juris, i.e. either condictions or actions founded on delict.

Of the formula arbitraria in a real action we have an instance in Cicero, Lucius Octavius judex esto. Si paret fundum capenatem, quo de agitur, ex jure Quiritium [Auli Agerii] esse, neque is fundus [Aulo Agerio] restituetur, In Verrem, 2, 2, 12. In an action for the production as a preliminary to the restitution of a person or thing (ad exhibendum) the clause would be of the form nisi exhibeat, and generally some special modification of nisi actori satisfaciat. In noxal actions there was probably no clause nisi noxae dedat, but the judgment was of the form Publium Maevium Lucio Titio decem aureis condemno aut noxam dedere, Inst. 4, 17; for the defendant was intended to exercise the election of paying damages or surrendering the author of the mischief. But in other actions no such discretion was intended to be given, and the damages were meant as a penal sum to enforce obedience to the judge's order. This

object was enforced by Jusjurandum in litem, an institution that will be presently explained.

As soon as the rule was established: omnia judicia esse absolutoria, § 114, that in every action a defendant might avoid condemnation by satisfying the plaintiff's claim even after the commencement of the suit, it might seem that the formula arbitraria was rendered unnecessary. But this was not so; for whereas in other actions the defendant might hope for a judgment in his favour, in actio arbitraria as soon as the arbitratus or order was pronounced he would know that he would inevitably be condemned unless he made the restitutio or exhibitio required. The formula arbitraria would, however, become in most cases unnecessary in the last period of Roman law when, as we shall presently see, the defendant was not invited under pain of heavy damages, but compelled by the public force (manu militari), to make specific restitution.

The intentio of an action with a formula in factum concepta was sometimes one-limbed; e.g. Si paret .... vocatum esse, § 46, and sometimes two-limbed: e.g. Si paret (1) Aulum Agerium rem deposuisse (2) eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse. A one-limbed intentio would be used when the defence was a simple traverse or contradiction of the fact alleged by the plaintiff: a two-limbed formula would be used when the defendant confessed the fact alleged by the plaintiff but alleged a second fact (payment, release, novation, &c.) whereby the obligation created by the former was extinguished or counteracted.

Accordingly it would be a mistake to suppose that the clause: eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse was equivalent to the arbitratus or clause Ni restituat which in the preceding formula limits the condemnatio. The former clause raises the question whether restitution was made before the action was brought (ante judicium acceptum): the clause Ni restituat gives the defendant power to make restitution at any time after the action was brought but before the condemnatio: and there is no reason why the clause Ni restituat should not be added to the double-limbed as well as to the single-limbed formula in factum concepta or the formula in jus concepta.

§ 48. From the expression of Gaius, non ipsam rem condemnat sicut olim fieri solebat, we might suppose that statute-process (legis actio) differed from Formulary procedure in that, while in the latter the condemnation was always pecuniary, in the former, as in the

last stage of Roman law, the plaintiff recovered the specific object of litigation and not its pecuniary value. But it would be strange if Roman jurisprudence had thus retrograded, and its second stage had been less perfect than its first: and the meaning of Gaius doubtless is, that, whereas in the Formulary system a single action decided the claims of the plaintiff and assessed their money value, in the primitive system two actions were necessary; a principal action to decide on the justice of the plaintiff's claim, and a supplementary action (arbitrium liti aestimandae) to transform it into money. Probus apparently gives the terms in which the plaintiff who had succeeded in his principal suit demanded an arbiter to assess the damages: Arbitrum liti aestimandae postulo te, Praetor, uti des. This arbitrium was not reckoned among the forms of Statute-process because it was merely accessory to the principal action. Bethmann-Hollweg, § 87.

Two incidents of litis aestimatio in the formulary procedure deserve notice: (1) Jusjurandum in litem, and (2) the determination of the Moment to be considered by the judex in appraising the value of the plaintiff's interest.

(1) Jusjurandum in litem was not like jusjurandum necessarium a substitute for a judgment, but only one of the means of proof whereon in certain actions a judgment might be founded. These actions were (*a*) principally actiones arbitrariae. To induce the defendant to avoid condemnation by obedience to the judge's arbitratus, if the defendant contumaciously refused obedience, or by dolus or culpa lata had rendered himself unable to yield obedience to the order of the judex, the value of the plaintiff's interest in the subject of litigation (litis aestimatio) was not ascertained, as in other cases, by the judex with or without the aid of experts, but by the oath of the plaintiff. Although he was required to name the true value (quanti actoris intersit) not a mere fancy value or so-called value of affection, yet his conscientious estimate would naturally be higher than that of an impartial judge or disinterested valuer: and the largeness of the alternative condemnation would incline the defendant to make a specific restitution.

(*b*) Even in actiones stricti juris, if litis aestimatio, owing to the culpa of the defendant, is otherwise impossible to the judex; if, for instance, in the actio legis Aquiliae the subject has ceased to exist, then the judex may employ the oath of the plaintiff as a subsidiary evidence of the plaintiff's particular interest in the subject and of its market value. Vangerow, § 171.

(2) The Date of valuation, or time at which the value of the specific thing due from the defendant was estimated, depended on the nature of the action. As a general rule the date of valuation in stricti juris actions was the date of Litis contestatio, in Bona fide and Real actions the date of Condemnatio, Dig. 13, 6, 3, 2. But if a date for performance had been fixed in a contract that date was the date of valuation, Dig. 13, 3, 4. Again if the defendant had been guilty of Mora, the plaintiff had his election between any of these dates and the date of Mora, Dig. 19, 1, 3, 3, Dig. 17, 1, 37. The foregoing only relates to Real actions and Personal actions grounded on Dispositions (contracts and quasi-contracts): in personal actions grounded on Delict, the date of valuation was the date of delict, the date, in other words, of the inception of obligation.

These different dates for valuation were expressed in the formula by a different wording of the Condemnatio. In Real actions, § 51, and in Bona fide actions, § 47, where the date was the date of passing judgment or condemnation, the formula contained the words: quanti ea res *erit;* in delicts where the date of valuation was the date of delict, it contained the words: quanti ea res *fuit*, Dig. 9, 2, 2. No traces exist of the formula employed in Condictions whose time of estimation was the time of Litis contestatio; but there can be little doubt that it contained the words: quanti ea res *est*, Savigny, § 275.

It has already been mentioned, 3 § 212, that the value assessed was not the market value of the thing but its value to the plaintiff, and included mediate as well as immediate value.

In the legislation of Justinian the rules respecting litis aestimatio were of less importance, because the condemnatio was in many cases no longer pecuniary but commanded the conveyance of property (dare), delivery of possession (tradere), restitution (restituere), or production (exhibere), of the specific thing itself that was the original subject of litigation. The defendant was no longer invited, as in the actio arbitraria of the formulary system, but compelled by the armed force of the state, to make specific delivery or restitution. Qui restituere jussus judici non paret, contendens non posse se restituere, siquidem habet rem, manu militari officio judicis ab eo possessio transfertur, et fructuum duntaxat omnisque causae nomine condemnatio fit. Si vero non potest restituere, si quidem dolo fecit quominus possit, is quantum adversarius in litem sine

ulla taxatione in infinitum juraverit damnandus est. Si vero nec potest restituere, nec dolo fecit quo minus possit, non pluris quam quanti res est, id est, quanti adversarii interfuit, condemnandus est. Haec sententia generalis est, et ad omnia sive interdicta sive actiones, et sive in rem sive in personam sint, ex quibus arbitratu judicis quid restituitur, locum habet, Dig. 6, 1, 68. 'If a defendant allege inability to obey an order of restitution, if the thing exists, the court uses the military power to put the plaintiff in possession, and only condemns the defendant for the mesne profits and deteriorations. If the defendant has maliciously disabled himself from restitution, he is condemned in the amount, subject to no taxation, at which the plaintiff on oath assesses his loss; if the inability is not maliciously produced, the judge assesses the damages. This applies to all interdicts and actions, real and personal, where the court orders restitution.' Only in certain obligations of performance or non-performance the condemnation was still pecuniary: Quia non facit quod promisit in pecuniam numeratam condemnatur, sicut evenit in omnibus faciendi obligationibus, Dig. 42, 1, 13.

§ 49. In condictio Certi, as we have seen, § 5, both the Intentio and the Condemnatio are certae: in condictio Triticaria, as in Real actions, the Intentio, naming certa res, is certa; but the Condemnatio, containing the words, Quanti ea res est, is incerta. A loan (numeratio, mutuum) of money (pecunia certa credita) always gave rise to a condictio certi and could not be recovered by any other form of suit: whereas a loan of any other quantitas (corn, wine, oil, &c.) founded a condictio triticaria. The difference of the formulae in these actions explains the following rule of substantive law, which otherwise seems capricious: A valid informal convention (nudum pactum) for interest could be annexed to a loan of corn, wine, or oil, Cod. 4, 32, 23, but not to a loan of money, Dig. 19, 5, 24.

The reason was this: the loan of any other quantitas than money, having an incerta condemnatio, allowed the judge of a suit brought for recovery of the principal to include interest in the sum which he condemned the defendant to pay: whereas the money loan having a certa condemnatio, coinciding with the intentio in the sum it defined, the judge of a suit brought for the principal, under pain of litem suam facere, § 52, could only condemn the defendant to pay the principal.

If, then, interest on a loan of money was intended to be paid, it

was necessary to secure it by a formal contract (stipulatio) which would found a condictio incerti distinct from the condictio certi which might be brought for the principal: whereas interest for any other quantitas could be secured by a pactum nudum annexed to the numeration, ponderation, or mensuration of the principal, Dig. 12, 1, 7, and recovered in the action brought for the principal.

As the stringency of the rule respecting money loans depended on the peculiarity of the formula, it should not have been retained by Justinian after the abolition of the Formulary procedure. Savigny, System, § 268.

The wording of the formula in Condictio certi was doubtless the reason why in the Formulary period the legatee could not recover interest on his legacy, 2 § 280.

§ 52. A judex might make a cause (liability, condemnation) his own by corruption or carelessness. If he gave a wrong judgment from dolus, he was liable to be condemned in the whole amount under litigation, Dig. 5, 1, 15. If from culpa he was liable to be condemned in such damages as the judge in his discretion should assess, Dig. 50, 13, 6.

PLUS PETITIO.

§ 53. Si quis intentione *plus* com*plexus* *fuerit, causa cadit, id est rem* perdit, n*ec* a Praetore in in*tegrum restituitur, praeterquam quibusd*am casibus in qu*ibus Praet*or e*dicto succurrit* [1⅔ *lin.*]. *Plus autem quatuor* modis petitur: re, tempor*e, loco, causa* [*desunt* 11 *lineae*]. . . . petere id *etiam* non adiecto loco.

§ 53. If the Intentio claim more than the plaintiff is entitled to, he loses the whole, and is not relieved by the praetor except in a few cases mentioned in the edict. He may claim too much in amount, time, place, or specification. He may demand a larger sum than is due, or demand to be paid at an earlier time than he stipulated, or at a different place without confessing that the place is different from that named in the stipulation.

§ 53*a*. Causa plus petitur, velut si quis in intentione tollat electionem debitoris quam is habet obligationis iure. velut si quis ita stipulatus sit: SESTERTIUM X MILIA AUT HOMINEM STICHUM DARE SPONDES? deinde alterutrum ex his petat; nam quamvis petat quod minus est, plus tamen petere videtur, quia potest adversarius interdum facilius id praestare quod non

§ 53*a*. He claims too much by specification if he deprives the debtor of an election to which he was entitled by the contract; for instance, if he stipulated to receive alternatively either ten thousand sesterces or the slave Stichus, and makes an unconditional claim for one or the other. For though the one that he claims be of lesser value, the other may be more convenient for

petitur. similiter si quis genus stipulatus sit, deinde speciem petat. velut si quis *purpuram* stipulatus sit generaliter, deinde Tyriam specialiter petat: quin etiam *licet* vilissimam petat, idem iuris est propter eam rationem quam proxime diximus. idem iuris est si quis generaliter hominem stipulatus sit, deinde nominatim aliquem petat, velut Stichum, quamvis vilissimum. itaque sicut ipsa stipulatio concepta est, ita et intentio formulae concipi debet.

the debtor to convey. So if he stipulated for a genus and demands a species, stipulated, for instance, for purple and demands Tyrian purple, even though he demand the cheapest species, he claims more than his due, for the same reason. So he does if he stipulated generally for a slave and claims a certain slave, Stichus, for instance, however worthless. The Intentio, then, must exactly pursue the terms of the stipulation.

§ 54. Illud satis apparet in incertis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed quidquid adversarium dare facere oporteret intendat*ur*, nemo potest plus intendere. idem iuris est, et si in rem incertae partis actio data sit; velut si heres QUANTAM PARTEM petat IN EO FUNDO, QUO DE AGITUR, *PAREAT IPS*IUS ESSE: quod genus actionis in paucissimis causis dari solet.

§ 54. It is clear that an Intentio naming an uncertain sum cannot be excessive, for it claims no certain quantity, but only whatever the defendant ought to convey or perform. The same is true of real actions to recover uncertain shares, as that whereby a heres claims whatever portion of the inheritance he may be entitled to, which kind of action is seldom granted. [Dig. 6, 1, 76, 1.]

§ 55. Item palam est, si quis aliud pro alio intenderit, nihil eum periclitari eumque ex integro agere posse, quia *nihil in iudicium deducitur, velut* si is qui hominem Stichum petere deberet, Erotem petierit; aut si quis ex testamento dare sibi oportere intenderit, cui ex stipulatu debebatur; aut si cognitor aut procurator intenderit sibi dare oportere.

§ 55. It is also clear that the plaintiff who claims the wrong thing in his Intentio, runs no risk and can bring another action because his right has not been tried, if he is entitled, for instance, to Stichus and claims Eros, or if he is entitled by stipulation and alleges in the Intentio that he is entitled under a will, or if a cognitor or procurator claim in his own right instead of in the right of his principal.

§ 56. Se*d* plus quidem intendere, sicut supra diximus, periculosum est: minus autem intendere licet; sed de reliquo intra eiusdem praeturam agere non permittitur. nam qui ita agit per exceptionem excluditur, quae exceptio appellatur litis dividuae.

§ 56. To claim too much, as I have said, is dangerous; a man who claims less than his right does not forfeit his right, but cannot sue for the remainder in the same praetorship, for he is repelled by the exception against Division of actions.

§ 57. A*t* si in condemnatione plus petitum sit quam *oportet*, actoris qui*dem* periculum nullum est, sed *si* iniquam formulam acceperit, in

§ 57. If too much is claimed in the Condemnatio the plaintiff is not imperilled, but is relieved and allowed to reduce the Condemnatio. If

integrum restituitur, ut minuatur condemnatio. si vero minus positum fuerit quam oportet, hoc solum consequitur quod posuit: nam tota quidem res in iudicium deducitur, constringitur autem condemnationis fine, quam iudex egredi non potest. nec ex ea parte Praetor in integrum restituit: facilius enim reis Praetor succurrit quam actoribus. loquimur autem exceptis minoribus XXV annorum; nam huius aetatis hominibus in omnibus rebus lapsis Praetor succurrit.

less is laid in the Condemnatio than he is entitled to, he only obtains that amount, for his whole right has been brought before the judex and is reduced to the amount laid in the Condemnatio, a limit which the judex cannot exceed; and in this case the praetor gives no relief, for he is less ready to relieve the plaintiff than the defendant, excepting always minors, whom he invariably relieves.

§ 58. Si in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet: et hoc est quod dicitur falsa demonstratione rem non perimi.

§ 58. If more or less is laid in the Demonstratio, the plaintiff's right is not tried and therefore remains intact, and this is the meaning of the saying that a right of action is not consumed by a false Demonstration.

§ 59. Sed sunt qui putant minus recte comprehendi. nam qui forte Stichum et Erotem emerit, recte videtur ita demonstrare: QUOD EGO DE TE HOMINEM EROTEM EMI, et si velit, de Sticho alia formula idem agat, quia verum est eum qui duos emerit singulos quoque emisse: idque ita maxime Labeoni visum est. sed si is qui unum emerit de duobus egerit, falsum demonstrat. idem et in aliis actionibus est, velut commodati, depositi.

§ 59. Some think that less may be properly expressed in the Demonstratio, as a man who bought both Stichus and Eros may state in his Demonstratio, 'Whereas I bought of you the slave Eros,' and sue for Stichus in another action, because the purchaser of both is the purchaser of each; and this was Labeo's opinion. But if the purchaser of one says he purchased two, the Demonstratio is false; and the same applies to actions of Loan for use and Deposit.

§ 60. Sed *nos* aput quosdam scriptum invenimus, in actione depositi et denique in ceteris omnibus quibus damnatus unusquisque ignominia notatur, eum qui plus quam oporteret demonstraverit litem perdere. velut si quis una re deposita duas res deposuisse demonstraverit, aut si is cui pugno mala percussa est in actione iniuriarum esse aliam partem corporis percussam sibi demonstraverit. quod an debeamus credere verius esse, diligentius requiremus. certe cum duae sint depositi formulae, alia in ius concepta,

§ 60. I have read in some writers that in actions of Deposit, and whereever condemnation involves infamy, a plaintiff has consumed his right to sue if his Demonstratio exceeds the truth (or names one thing for another), for instance, if he deposited one thing and says he deposited two, or if he was struck in the face and his Demonstratio in an action of assault mentions another part of the body. Let us examine this question. There are two formulas of the action of Deposit, one of law, the other of fact, as we said

alia in factum, sicut *supra* quoque notavimus, et in ea *quidem* formula quae in i*us* concepta est, initio res de q*ua* agitur demonstretur, tum designetur, deinde inferatur iuris contentio his verbis: QUIDQUID OB *EA*M REM ILL*UM* MIHI DARE FACERE OPORTET; in ea vero quae in factum concep*ta est statim* initio *intent*ionis l*oco* r*es* de q*ua agitur* designetur his verbis: SI PARET ILLUM APUT *ILLUM REM* ILLAM DEPOSUISSE: dubitare non debemus, quin si quis in formula quae in factum composita est plures res designaverit quam deposuerit, l*item* perd*at*, quia in intentione pl*us* po . . . [*desunt* 48 *lin.*]

before. The formula of law begins by defining the ground of action in the Demonstratio, and then appeals to the law in these terms: 'Whatever the defendant ought therefore to convey or perform.' The formula of fact commences with an Intentio defining the ground of action, thus: 'If it be proved that such a plaintiff deposited such a thing with such a defendant.' Certainly in the latter case, that is, in a formula of fact, if the plaintiff asserts that he deposited more than he really deposited, he loses all, because the excess is in the Intentio [and he has consumed his right of action].

§ 53. When the Forum or court in which an action on a contract is brought happened to differ from the place specified in the contract as the place where a certain act (payment, delivery, conveyance, &c.) was to be performed, if the contract was such as naturally to ground a Condictio (actio stricti juris), in order to avoid the fault of Plus petitio, which would be fatal to the present claim and to any subsequent claim on the same contract, it was necessary to sue, not by a Condictio which would be the proper form if the action were brought at the stipulated place of performance, but by formula Arbitraria. A defendant who lost an action was bound to make payment at the forum where the action was brought: ibi erit praestandum ubi petitur, Dig. 30, 47, 1. In an actio Arbitraria the judge could consider the difference of place and meet the demands of equity by increasing or diminishing the amount which his arbitratus required the defendant to pay in order to avoid condemnatio. If the contract were such as to give rise to a Bona fide actio, it would not be necessary to sue by formula Arbitraria in order to avoid Plus petitio, for the judex of an actio Ex bona fide had more discretion than the judex of a Condictio and by the wording of his commission, Ex fide bona, could allow for the difference of place if performance were enforced at a place different from that specified in the contract.

To understand the foregoing we must consider the various tribunals before which an action can be instituted: at what forum or before what judge a plaintiff can sue a defendant.

The Forum at which an action can be brought is twofold: it is either General or Special. The General forum is the forum of the domicil of the defendant: actor rei forum, sive in rem sive in personam sit actio, sequitur, Cod. 3, 19, 3. Juris ordinem converti postulas, ut non actor rei forum sed reus actoris sequatur, Cod. 3, 13, 2. See p. 337.

The Special forum depends on the nature of the right to be litigated: on the department of the code to be applied.

The special forum of a Real right is the forum where the Res (subject of property, servitude) is situated (forum rei Sitae).

The special forum of an Obligation is generally, in Roman law, the forum of the place where the act is covenanted to be performed (forum Solutionis). In English law it is rather the forum of the place where the contractors entered into their contract, forum Contractus. It was when a stipulation was enforced at the general forum of the defendant instead of at the special forum of the stipulation that it was necessary to use the formula Arbitraria.

The special forum of a Delict is the place where the delict was committed.

The special forum of Insolvency coincides in Roman law with the general forum, i. e. is the domicil of the insolvent.

The Special forum of Succession (hereditatis petitio) is the forum of the locus delicti (trespass of the defendant) which will coincide with the place where the subject of inheritance is situated (forum rei Sitae).

Distinct from the question of the Forum that has jurisdiction over a right or obligation is the question of the Law that defines such right or obligation: what local, municipal, or national Law governs the relation of the plaintiff and defendant, and has to be administered by the Forum, whatever and wherever it may be, that exercises jurisdiction.

The question of the Forum before which a suit must be instituted and of the particular Law which such Forum must administer may arise (1) within the limits of a single state when divided, like the Roman empire, into municipalities with separate jurisdictions and, to a certain extent, separate laws: or (2) in more or less intimate aggregations of provinces, cantons, states, such as we see in Switzerland, Holland, Germany, America; or (3) between different sovereign states.

The territorial, local, or municipal law that governs a particular

question is determined by one of four circumstances: the domicil of a certain person (testator, intestate, insolvent, husband, disposer, debtor, &c.): the place where the subject of property is situated: the place of performance of an act past or future (disposition, stipulated service): or the forum before which a cause is litigated.

For Property and Obligation ex contractu the appropriate Law is the law of the place which supplies the special forum.

Thus in a question of Property the law to be applied is the lex loci rei Sitae. E. g. in France property passes by contract, in Prussia by tradition. A Frenchman in France sells to another Frenchman his goods in Prussia. The property only passes by tradition. A Prussian in Prussia sells to another Prussian his goods in France. The property passes by the mere contract of sale.

In a question of contract the law to be applied is primarily the lex loci Solutionis.

The Roman doctrine that Inheritance is a Universal succession implies that the ideal patrimony has its single seat in the domicil of the heritage-leaver and is governed by the law of that domicil. Thus the law which governs Succession is not, after the analogy of the former cases, the law of the special forum of Succession: for whereas the law which governs Succession is the law of the heritage-leaver's last Domicil; we have seen that the special forum of Succession is the forum rei Sitae.

But though the law of the testator's last domicil principally governs its dispositions (questions relating to institution, disinheritance, preterition, inofficiositas, legacies, &c.) yet there are some elements of a will to which other laws must be applied. The capacity of the testator (testamentifactio, commercium) must exist both at the date of executing the will and at the date of his decease: and must be tested at the former date by the law of his then domicil. Again the capacity of honoratus (heir or legatee) is governed by the law of the domicil of honoratus at the time of testator's death. Indeed in Roman times, though not in modern Germany, this capacity was required at tria tempora, the making of the will, the death of the testator, and the acquisitio by honoratus, p. 224, and was governed at each period by the law of his then domicil.

The Capacity of a person for contracting and otherwise disposing is governed by the law of his domicil: with this reservation, that Majority once attained is regarded as a vested right which cannot

be divested by a mere change of domicil: by settling, that is to say, in a new domicil where majority comes later.

The validity of the Form of any disposition (contract, marriage, testament, &c.) depends on the law by which the substance of the disposition is governed (the law of the stipulated place of performance, the law of the husband's domicil, the law of the testator's domicil at the time of making his will). But inconveniences would arise if this law were exclusive. For instance, a Prussian will can only be made with the assistance of a court. In France no court is authorized to give its assistance to the execution of a will, which is the function of the Notary. A Prussian, then, domiciled in Prussia but dying in France, would be unable to execute a will if he could only do it in the form prescribed by Prussian law. Accordingly, as an alternative to the law that governs the disposition, the law of the place where the disposition is made is accepted: and the form of a disposition is valid if it satisfies either the proper law of the disposition or the law of the territory in which the disposition is made. The applicability of the latter law is expressed by the maxim: Locus regit actum. We must except the forms of Alienation which must always satisfy the lex rei Sitae.

Procedure is governed by the law of the forum where a suit is instituted. Dilatory exceptions, accordingly, as based merely on rules of procedure, depend on the law of the forum. But the material contentions of the defence, that is, the rights of the defendant, whether ipso jure extinctive, or per exceptionem peremptoriam counteractive, of the rights of the plaintiff, are governed by the same law as the rights of the plaintiff; that is by the local law that governs the obligation. The Exceptio Sc. Macedoniani and Sc. Velleiani, however, as relating to personal Capacity, are governed by the law of the domicil of the person in question.

Procedure in Bankruptcy being a partial or imperfect Execution, its leading feature, the Classification or marshalling of creditors, like other matters of Procedure, is governed by the law of the Forum by which the execution is superintended, which in this case will be the law of the domicil of the Insolvent. The priorities of the purely personal creditors, that is to say, will be governed by the law of the forum: but where there are hypothecary creditors who hold mortgages over property of the insolvent in other lands, their priorities involving a question of Real rights will depend on the lex rei Sitae. The preliminary Proof by the creditors of their particular

claims will be governed by the law (law of the stipulated place of performance, &c.) which according to general rules is applicable to the obligations they respectively seek to enforce.

Exceptions to most of the preceding rules are produced by the existence of Imperious and Anomalous laws: laws based on religious, moral, political, financial, administrative, instead of purely civil, motives: such as laws relating to heresy, usury, gambling, revenue, mortmain; or laws implying institutions (e. g. slavery, civil death) unrecognized by other states. Each forum enforces its own Imperious or Anomalous laws, and disregards those of its neighbour. For instance a monogamist forum will not enforce polygamistic laws, nor will any forum enforce the penal laws which a neighbour levels against its coreligionists.

Obligation founded on Delict is always the subject of such Imperious laws: accordingly civil obligation ex delicto, unlike obligation ex contractu, is governed by the laws of the forum by which it is remedied.

The rules of which the above are a specimen constitute what is called the Comity of nations or Private international law. The ideal aim of the Comity of nations is: that the judgment passed on any controversy should be identical whatever may be the tribunal that happens to exercise jurisdiction. Savigny, System, vol. 8.

The penalty of pluris petitio in respect of time was reduced by Zeno, who merely doubled the term that was still to run before payment, and required the creditor to pay the costs of the former action before he brought a second, Cod. 3, 10. The effect of this was to change the meaning of the term 'dilatoria,' which, as applied to an exceptio and opposed to peremptoria, denoted an exceptio alleging pluris petitio in Time.

When Gaius wrote, such an exception, if successfully alleged, was just as fatal to the creditor as an exceptio peremptoria. It was temporary, not in respect of its effects, but of the limited period during which it was at the command of the debtor. But after Zeno such an exceptio was temporary in its effects, and did not prevent a renewal of the action after a certain lapse of time, that is, after the expiration of the term originally fixed for the payment, and an additional term measuring the temporal excess of the plaintiff's claim. Justinian retained Zeno's law in respect of Time, and disarmed the other modes of pluris petitio of their terrors, by merely making the creditor liable to three times the amount of

the loss that his exorbitant claim had caused to the debtor, particularly in respect of the fees (sportulae) of the executive officers (executores), Cod. 3, 10, 2. See p. 579.

§ 55. A plaintiff who had made a mistake in the subject of his claim was allowed by Justinian to amend his claim without instituting a new action.

It seems from this paragraph that the title or ground of action (causa debendi) e. g. testamentum, stipulatio, was sometimes specified in the Intentio. Perhaps this was done in Condictio certi, which had no Demonstratio, and then availed to prevent the consumption of the right of action; that is, the allegation of the plea of Res judicata when the plaintiff afterwards claimed the same sum but founded his claim on a different title.

§ 56. A plaintiff whose intentio claimed less than he was entitled to was allowed by Zeno to obtain the full amount without instituting a new action, Inst. 4, 6, 34.

§ 60. It appears that some jurist had regarded the first clause of an actio in factum, si paret . . . fecisse, as a demonstratio. Gaius himself, in speaking of this clause used ambiguous terms, nominato eo quod factum est, § 46. But it is clear from § 60 that he holds it to be no Demonstratio, but an Intentio.

The plaintiff who lost an actio in factum did not strictly speaking lose his right to bring another action, for novatio, or transformation of his original right into a right to have judgment, was only operated by the commencement of a personal action in jus. But this made no practical difference, for though his own right (ipsum jus) was not extinguished, it was counterpoised by an opposite right of the defendant based on the result of the trial (exceptio rei judicatae), which would cause any suit instituted by the plaintiff to be dismissed.

COMPENSATIO ET DEDUCTIO.

§ 61. *In bonae fidei iudiciis libera potestas permitti videtur iudici ex bono et aequo aestimandi quantum actori restitui debeat. In quo et illud* contin*etur*, *ut habita* ratione *eius* quod i*nvicem acto*rem *ex* eadem causa *praestare* oporter*et*, in *reli*quum eum cum quo actum est condemnare *debeat*.

§ 61. In equitable actions the judex has full power to assess on good and equal grounds the amount due to the plaintiff, and can take into account the cross demand in the same transaction of the defendant, and condemn the defendant in the remainder.

§ 62. Sunt autem bonae fidei

§ 62. Equitable actions are those

iudicia haec: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, *commo*dati.

of Purchase and Sale, Letting and Hiring, Voluntary work, Agency, Deposit, Trust, Partnership, Guardianship, Loan of use, [Mortgage, Partition of inheritance, Dissolution of joint ownership, Nameless contract].

§ 63. Tam*en* iudici . . . co*mpen*-*s*ationis r*ati*onem habere *non ipsius* formulae v*er*bis praecipitur; sed quia id bonae fidei iudicio conveniens videtur, id*eo* officio eius contineri creditur.

§ 63. The judex is not expressly instructed by the terms of the formula to make compensation, but as it seems fit and proper in an equitable action, the power is assumed to be contained in his commission.

§ 64. Alia causa est illius actionis qua argentarius experitur: nam is cogitur cum co*m*pensatione agere, *id est ut* co*m*pensatio *v*erbis formulae comp*reh*endatur. *itaque* arg*en*-*tarius* ab initio co*m*pensatione facta minus intendit sibi dare oportere. ecce enim si *sestertium* x milia debeat Titio, atque *ei* xx debea*t Titius*, *ita int*endit: si paret Titium sibi x milia dare oportere amplius quam *i*p*se* T*i*t*io* debet.

§ 64. It is otherwise in the action instituted by a banker for the balance of an account, for the banker is compelled to make express recognition of compensation in his formula, and accordingly allows for any credit-items from the first, and in his Intentio only claims the balance. If he owes ten thousand sesterces to Titius and Titius owes him twenty thousand, his Intentio runs as follows: 'If it be proved that Titius owes him ten thousand sesterces more than he owes Titius.'

§ 65. Item . . . bonorum emptor cum deductione agere *d*ebe*t*, id *est ut* in hoc solum adver*s*arius c*on*-demnetur quod superest, deducto eo quod invicem *s*ibi defraudatoris nomin*e* debet*ur*.

§ 65. Likewise the purchaser of a bankrupt's estate must notice any cross demand in his formula, and in the condemnatio only require the defendant to pay what he owes after deduction of what was due to him from the insolvent.

§ 66. Inter conpensationem autem quae argentario interponitur, et deductionem quae obicitur *bonorum emptor*i, illa d*iff*erentia est, quod in co*m*pensationem hoc solum vocatur quod eiusdem generis et naturae est. veluti pecunia cum pecunia co*m*pens*a*tur, triticum cum tritico, vinum cum vino: adeo ut quibusdam place*a*t non omni modo vinum cum vino, aut triticum cum tritico co*m*pensandum, sed ita si eiusdem naturae qualitatisque sit. in deductionem autem vocatur et quod non est eiusdem generis. itaque si *a*

§ 66. Between the compensation which is made against the claim of the banker and the deduction from the claim of the execution purchaser there is this difference, that compensation is confined to claims of the same genus and nature; money, for instance, is set off against money, wheat against wheat, or wine against wine; and some even hold that not every kind of wine or every kind of wheat may be set off against wine and wheat, but only wine and wheat of the same nature and quality. Deduction, on the contrary, is made

Titio pecuniam petat bonorum emptor, et invicem frumentum aut vinum *Titio* debeat, deducto quanti id erit, in reliquum *ex*periter.

of a debt of a different genus. Thus, if Titius owed money to the insolvent, and is owed corn or wine, the value of the corn or wine is deducted, and he is only sued by the execution purchaser for the residue.

§ 67. Item vocatur in deductionem et id quod in diem debetur; co*m*pensatur autem hoc solum quod praesenti die debetur.

§ 67. Again, deduction is made of debts not yet due, compensation only of debts already due.

§ 68. Praeterea co*m*pensationis quidem ratio in intentione ponitur: quo fit, ut si facta co*m*pensatione plus nummo uno intendat argentarius, causa cadat et ob id rem perdat. deductio vero ad condemnationem ponitur, quo loco plus petenti periculum non intervenit; utique bonorum e*mptore* agent*e*, qui licet de certa pecunia agat, incerti tamen condemnationem concipit.

§ 68. Again, compensation is inserted in the Intentio, and if the Intentio of the banker is one sesterce more than the balance, he loses his present cause and his future claim; whereas the deduction is introduced in the Condemnatio, where an excessive claim is not hazardous; especially as the execution purchaser, though the debt he claims is certain, sues for an uncertain sum in the Condemnatio.

§ 61. Compensation was originally limited to claims growing out of the same ground (ex eadem causa, § 61); growing out of a transaction, that is, that generated either a bilateral obligation and gave to both parties an actio directa, or a semi-bilateral obligation, giving to one party actio directa and to the other actio contraria. In other words Compensatio was confined to actions ex bona fide. The emperor Marcus Aurelius made the identity of title (eadem causa) unnecessary: he allowed Compensatio to be urged against claims based on transactions that could only generate unilateral obligations: in other words, he admitted Compensatio in Condictiones or stricti juris actiones. (It was merely by inadvertence that Justinian in compiling his own Institutions out of these of Gaius retained the words ex eadem causa in the definition of Compensation, Inst. 4, 6, 39. Savigny § 45.)

In an actio bonae fidei Compensation of the defendant's counterclaim ex eadem causa would not require to be commanded by an express exceptio, but would be included in the officium judicis; i.e. would be made by the judex in virtue of the terms EX BONA FIDE contained in the formula which gave him his commission. In an actio stricti juris the judex was empowered to make compensation by the Exceptio Doli mali: Sed et in strictis judiciis ex rescripto divi Marci, opposita doli mali exceptione, compensatio

inducebatur, Inst. 4, 6, 30. The same exceptio was doubtless necessary even in an action ex bona fide when the counterclaim arose from an independent transaction (ex alia causa).

The exception was of the form: Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat, 4 § 119: and we find in the Digest a definition of Dolus that seems intended to apply to a claim for Compensation: Dolo facit qui petit quod redditurus est, Dig. 44, 4, 8.

Some writers hold that this exceptio empowered the judex, not to make compensation but to give judgment against the plaintiff on the ground of Plus petitio; and they explain that this was not so iniquitous as at first sight it may appear, as the loss of the action would only be a penalty to the plaintiff for refusing to employ a formula containing a Compensatio or Deductio, the usage of these formulae being in effect generalized by the rescript of Marcus Aurelius.

Vangerow, on the other hand, observes that we have no evidence that an intentio modified by a Compensatio or Deductio was ever employed by any plaintiff but the Argentarius and Bonorum emptor: while we are expressly informed by Theophilus 4, 6, 30, that the effect of Exceptio doli was to diminish the condemnatio; which again is consistent with what is said of the general nature of exceptio: Exceptio est conditio quae modo eximit reum condemnationi, modo minuit damnationem, Dig. 44, 1, 22.

As Gaius flourished under Marcus Aurelius, and makes no mention of his rescript, we must infer that it either was issued after the publication of these Institutions, or was mentioned in the preceding paragraphs where the manuscript is now defective.

Justinian extended Compensation to Real actions, Cod. 4, 31, 14.

§ 66. The balance for which the banker sued was not the balance of a Personal account, but the balance of one of the Real accounts for corn, wine, oil, &c., into which the debtor's total personal account was subdivided. The law courts, that is, took notice of the customary practice of the book-keepers, and a question naturally arose as to the extent to which a personal account could be subdivided.

§ 68. It was the duty of the Argentarius to keep the accounts of his customers: whereas the Bonorum emptor might well be ignorant of the transactions of the insolvent. This explains the greater rigour with which the Argentarius was treated.

A defendant was allowed to deduct his cross demand or independent debt from the demand of the plaintiff by the English courts of Equity, but not by the courts of Common law, until the Statutes 2 Geo. II, c. 22; 8 Geo. II, c. 24, introduced the plea of set-off into the courts of Common law.

DE ACTIONIBUS EX CONTRACTU FILIORUM ET SERVORUM.

§ 69. Quia tamen superius mentionem habuimus de actione qua in peculium filiorumfamilias servorumque agatur, opus est, ut de *h*ac actione et de ceteris quae eorumdem nomine in parent*es* dominosve dari solent diligentius admoneamus.

§ 69. As we have mentioned the action in respect of Peculium, we must explain this action and the others by which fathers and masters are sued for the debts of their sons or slaves.

§ 70. Inprimis itaque si iussu patris dominive negotium gestum erit, in solidum Praetor actionem in patrem dominumve conparavit: et recte, quia qui ita negotium gerit magis patris dominive quam filii servive fidem sequitur.

§ 70. Firstly, if it was at the bidding of the father or master that the plaintiff contracted with the son or slave, the father or master may be sued for the whole amount, for then the contract was made in reliance on the credit of the father or master rather than of the son or slave.

§ 71. Eadem ratione comparavit duas alias actiones, exercitoriam *et* institoriam. tunc autem exercitoria locum habet, cum pater dominusve filium servumve magistrum navis praeposuerit, et quod cum eo eius rei gratia cui praepositu*s* fuit negotium gestum erit. cum enim ea quoque res ex voluntate patris dominive contrahi videatur, aequissimum *Praetori* visum est in solidum actionem dari. quin etiam, licet extraneum quis qu*emcumque magistrum navi* praeposuerit, sive servum sive liberum, tamen ea Praetoria actio in eum redditur. ideo autem exercitoria actio appellatur, quia exercitor vocatur is ad quem cottidianus navis quaestus pervenit. Institoria *vero* formula tum locum habet, cum quis tabernae aut cuilibet negotiationi filium servumve *aut etiam* quemlibet extraneum, sive servum sive liberum, praeposuerit, et quid cum eo eius rei gratia cui

§ 71. On the same principle the praetor grants two other actions, one to recover the debt of a ship-captain, the other to recover the debt of a manager or factor. The actio exercitoria lies against a father or master who has appointed a son or slave to be captain of a ship, to recover a debt incurred by the son or slave in his character of captain. As such a contract is made with the consent of the father or master he is justly liable for the whole. So if a man appoint another person's slave or a freeman to be captain, he may be sued by the praetorian action. The action is called Exercitoria because the shipowner or charterer who appoints the captain is called Exercitor. The actio Institoria lies against a man who appoints his son or slave or another person's slave or a freeman to manage a shop or any business, to recover any debt incurred in that

praepositus est contractum fuerit. ideo autem institoria *appellatur, quia qui* tabernae praeponitur institor appellatur. quae *et ipsa* formula in solidum est.

§ 72. Praeterea tributoria *quoque actio* in patrem dominumve *Praetoris edicto de eorum mercibus re*busve constituta est, cum filius servusve *in peculi*ari *merce sciente patre dominove negotiatur. nam si quid cum eo eius rei causa contractum erit, ita Praetor ius dicit, ut quidquid in his mercibus erit, quodque inde receptum erit, id inter patrem dominumve, si quid ei debebitur, et ceteros creditores pro rata portione distribuatur. et quia ipsi patri dominove distributionem permittit, si quis ex creditoribus queratur, quasi minus ei tributum sit quam oportuerit, hanc ei actionem adcommodat, quae tributoria appellatur.*

§ 73. *Praeterea introducta est actio de peculio deque eo quod in rem patris dominive versum erit, ut quamvis sine voluntate patris dominive negotium gestum erit, tamen sive quid in rem eius versum fuerit, id totum praestare debeat, sive quid non sit in rem eius versum, id eatenus praestare debeat, quatenus peculium patitur. In rem autem patris dominive versum intellegitur quidquid necessario in rem eius impenderit filius servusve, veluti si mutuatus pecuniam creditoribus eius solverit, aut aedificia ruentia fulserit, aut familiae frumentum emerit, vel etiam fundum aut quamlibet aliam rem necessariam mercatus erit. itaque si ex decem ut puta sestertiis quae servus tuus a Titio mutua accepit creditori tuo quinque sestertia solverit, reliqua vero quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes, pro ceteris vero quinque eatenus, quatenus in peculio sit : ex quo scilicet apparet, si tota decem*

business. It is called Institoria because the manager of a shop is called Institor, and it is brought for the whole amount.

§ 72. The edict provides another action, called Tributoria, in respect of the part of the Peculium which is devoted to a certain trade carried on by a son or slave with the knowledge of his father or master. If any debts are contracted in that trade the praetor orders this portion of the Peculium and its profits to be distributed between the father or master and other creditors in proportion to their claims, and charges the father or master with the distribution; and any creditor who complains that he has received less than his share can bring this action.

§ 73. There is also an action in respect of Peculium and of what has been converted to the uses of the father or master. When a debt is contracted without the consent of the father or master, if any portion was converted to his uses, he is liable to that amount; if no portion was converted, he is liable to the extent of the peculium. Conversion to his uses is any necessary expenditure on his account, as payment of his creditors, repair of his falling house, purchase of corn for his slaves, purchase of an estate for him, or any other necessary. If out of ten thousand sesterces which your slave borrowed of Titius he paid your creditor five thousand, and spent the remainder in some other way, you are liable for the whole of the five thousand, and for the remainder to the extent of the peculium. If the whole ten thousand was applied to your uses you are liable for the whole. It is a single action that is brought in respect of

*sestertia in rem tuam versa fuerint, tota decem sestertia Titium consequi posse. licet enim una est actio qua de peculio deque eo quod in rem patris dominive versum sit agitur, tamen duas habet condemnationes. itaque iudex aput quem ea actione agitur ante dispicere solet, an in rem patris dominive versum sit, nec aliter ad peculii aestimationem transit, quam si aut nihil in rem patris dominive versum intellegatur, aut non totum. Cum autem quaeritur quantum in peculio sit, ante de*ducitur quod patri dominove quique *in potestate eius sit a fi*lio servove debetur, et quod superest, hoc solum peculium *esse* intellegitur. *aliquando tamen id quod ei* debet filius servusve qui in potestate patris dominive *est non* deducitur ex peculio, velut *si* is cui debet in huius ipsius peculi*o* sit.

§ 74. Ceterum *dubium non est, quin is quoque qui iussu patris* dominive contrax*erit, cuique institoria vel exerci*toria formula competit, de peculio aut de in rem verso agere possit. sed nemo tam stultus erit, ut qui aliqua illarum actionum sine dubio solidum consequi possit, in diffiulctatem se deducat probandi *in rem patris dominive versum esse, vel habere filium servumve peculium, et tantum habere, ut solidum sibi solvi possit.* Is quoque cui tributoria actio co*m*petit, de peculio vel de in rem verso agere potest: sed huic sane plerumque expedit hac potius actione uti quam tributoria. nam in tributoria eius solius peculii ratio habetur quod in his mercibus *erit* quibus negotiatur filius servusve, *quod*que inde receptum erit, at in actione peculii, totius: et potest quisque tertia forte aut quarta vel etiam minore parte peculii negotiari, maximam vero partem *in praediis vel* in a*l*i*is* rebus habere; lo*nge magis si* potest adprobari id quod

Peculium and of conversion to uses, but it has two condemnatory clauses. The judex first looks to see whether there has been an application to the uses of the father or master, and does not proceed to ascertain the amount of the peculium unless there was no such application or only a partial application. In ascertaining the amount of the peculium, deduction first is made of what is owed to the father or master or to a person in his power, and the residue only is treated as peculium. Sometimes what is owed to a person in his power is not deducted, for instance, if it is owed to a vicarius, that is, to a slave in the peculium of the slave.

§ 74. There is no doubt that a creditor who contracted with the sanction of the father or master with a son or slave, and therefore might sue by exercitoria or institoria, may bring an action in respect of the peculium or of conversion to uses; but it would be foolish to relinquish the actions by which he can recover the whole, and undertake the trouble of proving a conversion to uses or the existence of a peculium sufficient in amount to cover the whole of the debt. A plaintiff who can sue by Tributoria may sue in respect of peculium and conversion to uses, and will generally find it expedient to do so; for Tributoria only relates to that portion of the peculium which consists of the merchandise and the proceeds of the merchandise with which the son or slave traded, but the others extend to the whole peculium; and a man may trade with only a third or fourth or less part of his peculium and have the rest invested in

debeatur totum in rem patris domi-nive versum esse, ad hanc actionem transire debet. nam, ut supra diximus, eadem formula et de peculio et de in rem verso agitur.

land or at interest. A fortiori, if the plaintiff can prove that the whole of the debt was converted to the uses of the father or master, he should use this action; for, as I said above, the same formula lies both in respect of peculium and of what has been converted to uses.

§ 71. The term Institor includes a banker (mensae praepositus), bailiff (agris colendis), foreman (mercaturis), bagman (sed etiam eos institores dicendos placuit, quibus vestiarii vel lintearii dant vestem circumferendam et distrahendam, quos vulgo circitores appellamus, Dig. 14, 3, 5), and any similar agent, of whatever age or sex (nam et plerique pueros puellasque tabernis praeponunt, Dig. 14, 3, 8).

The relation of the free captain (magister) to the shipowner (exercitor), and of the free manager, overseer, factor (institor) to his employer (dominus), was the germ or first manifestation of the general institution of Agency (mandatum), an institution that was slow in reaching its complete development in Roman jurisprudence.

§ 74. Actiones adjectitiae qualitatis, so called because a creditor of an inferior (slave or son or agent) has against the superior (owner or father or principal) an action additional (adjectitia) to that against the inferior, are six in number: Exercitoria, Institoria, De peculio, Tributoria, Quod jussu, De in rem verso. When Exercitoria and Institoria were brought against the superior or principal, it may be assumed that the Captain or Factor or Agent was named in the Intentio of the formula and the employer or principal in the Condemnatio, Savigny, System, § 54.

The son or slave with a Peculium was like an Institor, except that his trade or occupation was not, like that of the Institor, defined or prescribed by the superior.

In Tributoria the son or slave traded with the knowledge of his superior, and therefore resembled still more closely an Institor. Accordingly in Tributoria no previous deduction of the superior's claims could be made as in De peculio. One advantage of Tributoria was, that all commercial creditors, including the master of the slave, were treated on an equal footing, whereas in De peculio the sum due to the master was deducted before the peculium was computed for any other creditor. Another advantage was, that commercial creditors, i. e. creditors in respect of the particular trade in which the son or slave was engaged, had an exclusive right to satisfaction

out of the merx peculiaris, while other creditors could only have recourse to the residue of the peculium. A disadvantage of Tributoria was, that the creditor who received his share was obliged to bind himself to refund in case any new creditors should present their claims, whereas in De peculio the law adopted the principle, melior est conditio occupantis.

The actio Quod jussu, unlike the foregoing, is founded on the superior's consent to a single contract of the inferior.

The actio De in rem verso is founded on the advantage derived by the superior from a single contract of the inferior. The formula for this action was the same as that for De peculio, with a second additional Condemnatio, whereby the creditor might recover from the superior the amount of the superior's gain in addition to the amount of the peculium.

One contract with a filiusfamilias, namely, the loan of money (mutui datio) without the sanction of the father, was always invalid, in pursuance of the Senatusconsultum Macedonianum passed in the reign of Claudius or Vespasian.

Besides the equitable actions introduced by the praetor, a paterfamilias was rendered liable by the act of his son or slave to a condictio, that is, was liable under the civil law to an action stricti juris in two cases (which we must probably limit with Savigny by the hypothesis of a Money loan) if the act turned to his profit (si in rem ejus versum est), and if it had received his sanction, for a contract entered into by his order was regarded as his contract. The liability of the superior follows from the statement of the gist of Condictio, page 502. Illud in summa admonendi sumus, id quod jussu patris dominive contractum fuerit, quodque in rem ejus versum erit, directo quoque posse a patre dominove condici, tanquam si principaliter cum ipso negotium gestum esset. Ei quoque qui vel exercitoria vel institoria actione tenetur directo posse condici placet, quia hujus quoque jussu contractum intelligitur, Inst. 4, 7, 8. If the paterfamilias had neither ordered the transaction nor profited by it, the creditor's only remedy against him were the actions de peculio and tributoria.

DE NOXALIBUS ACTIONIBUS.

§ 75. Ex maleficiis filiorum familias servorumve, veluti si furtum fecerint aut iniuriam commiserint,

§ 75. For a delict, such as theft or outrage, committed by a son or slave, a noxal action lies against the

noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem sufferre aut noxae dedere: *erat* enim ini*qu*um nequitiam eorum ultra ipsorum corpora parentibus dominisve damnosam esse.

father or master, who has the option of either paying the damages assessed or surrendering the delinquent. For it is not just that the misdeed of a son or slave should involve the father or master in any detriment beyond the loss of his body.

§ 76. Constitutae sunt autem noxales actiones aut legibus aut edicto. legibus, velut furti lege XII tabularum, damni iniuriae [velut] lege Aquilia. edicto Praetoris, velut iniuriarum et vi bonorum raptorum.

§ 76. Noxal actions were introduced partly by law, partly by the edict of the praetor: for theft, by the law of the Twelve Tables; for injury to property, by the lex Aquilia; for outrage and rapine, by the edict.

§ 77. Omnes autem noxales actiones capita sequuntur. nam si filius tuus servusve noxam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem pervenerit, cum illo incipit actio esse; si sui iuris coeperit esse, directa actio cum ipso est, et noxae deditio extinguitur. ex diverso quoque directa actio noxalis esse incipit: nam si pater familias noxam commiserit, et hic se in adrogationem tibi dederit aut servus tuus esse coeperit, *quod* quibusdam casibus accidere primo commentario tradidimus, incipit tecum noxalis actio esse quae ante directa fuit.

§ 77. Noxal actions lie against the lord or chief of the malefactor. If your son or slave has done a wrong while he is in your power, an action lies against you; if he becomes his own master, a direct action lies against the offender himself (as his own lord), and the noxal action is extinguished. Conversely, a direct action may change into noxal: if a paterfamilias has done a wrong, and has become your son by adrogatio or your slave, as I showed in the first book might happen in certain circumstances, a noxal action lies against you in place of the direct action which formerly lay against the wrong-doer.

§ 78. Sed si filius patri aut servus domino noxam commiserit, nulla actio nascitur: nulla enim omnino inter me et eum qui *in* potestate mea est obligatio nascitur. ideoque et si in alienam potestatem pervenerit aut sui iuris esse coeperit, neque cum ipso, neque cum eo cuius nunc in potestate est agi potest. unde quaeritur, si alienus servus filiusve noxam commiserit mihi, et is postea in mea esse coeperit potestate, utrum intercidat actio, an quiescat. nostri praeceptores intercidere putant, quia in eum casum deducta sit in quo actio

§ 78. But no action lies for an offence by a son or slave committed against his father or master; for between me and a person in my power there is no obligation; and, consequently, if he passes under the power of another, or becomes his own master, neither he nor his master can be sued. Hence it has been asked whether, if another man's son or slave has wronged me and passes into my power, the action is extinguished, or is only in abeyance. Our school maintains that it is extinguished, because it has come into a condition in which

consistere non potuerit, ideoque licet exierit de mea potestate, agere me non posse. diversae scholae auctores, quamdiu in mea potestate sit, quiescere actionem putant, cum ipse mecum agere non possum; cum vero exierit de mea potestate, tunc eam resuscitari.

an action cannot exist, and therefore if he pass again out of my power I have no action. The other school maintain that while he is in my power the action is only in abeyance, because I cannot bring an action against myself, and revives when he passes out of my power.

§ 79. Cum autem filius familias ex noxali causa mancipio datur, diversae scholae auctores putant ter eum mancipio dari debere, quia lege XII tabularum cautum sit, *ne aliter filius de potestate patris* exeat, quam si ter fu*e*rit mancipatus: Sabin*us* et Cassius ceterique nostrae scholae auctores sufficere unam mancipationem; crediderunt enim tres lege XII tabularum ad voluntarias mancipationes pertinere.

§ 79. When a filiusfamilias is surrendered in satisfaction of judgment in a noxal action, the other school hold that he ought to be mancipated three times, because the law of the Twelve Tables provides that a son cannot pass out of the power of the father unless he is three times mancipated. Sabinus and Cassius and the other authorities of my school hold that a single mancipation is sufficient, and suppose that the three conveyances of the Twelve Tables are only required in voluntary emancipation.

§ 80. Haec ita de his personis quae in potestate *sunt*, sive ex contractu sive ex *m*aleficio earum *controver*sia esset. quod vero ad *eas* personas quae in manu mancipiove sunt, i*ta* ius *dici*t*ur*, ut cum ex *con*t*rac*tu earum ageretur, nisi ab eo cuius iuri subiectae sin*t in so*l*id*um defendantur, bona quae *earum fu*tura *f*oren*t*, si *eius* iur*i* subiectae non essent, *ve*ne*a*nt. sed cum rescis*sa capitis diminutione* imperio continenti iud*icio* [*desunt* 24 *lin.*]

§ 80. So much for the contracts and delicts of persons under power. As to persons subject to manus or mancipium, when they are sued for contracts, unless they are defended against the whole damages by the superior to whom they are subject, the goods which would have belonged to them but for their subjection are ordered by the praetor to be sold. An action rescinding the change of status and deriving its binding force from the praetor's executive supremacy . . .

§ 81. . . . . q*uamquam* diximus . . . . *permis*sum fuisse ei mortuos homines dedere, tamen et si quis *eum* dederit qui fato suo vita excesserit, aeque libera*tur*.

§ 81. . . . . though I said that a dead man . . . . yet if he died a natural death and the body is surrendered, the judgment is satisfied.

§ 77. Gaius explained the various modes by which a man might lose his freedom, 1 § 160. A person who fraudulently allowed himself to be sold with the view of sharing the purchase money, Inst. 1, 3, 4, a freedman ungrateful to his patron, Inst. 1, 16, 1, a woman who persisted in intercourse with a slave without the permission of

the master, all forfeited their freedom, the last by a Senatusconsultum Claudianum which was repealed by Justinian, Inst. 3, 12, 1. In the older law a man who failed to register himself at the census (incensus) lost his freedom; and by the Twelve Tables the fur manifestus and insolvent debtor were assigned (addicti) to the injured party, though, apparently, 3 § 189, not reduced to slavery.

§ 78. Justinian decides in favour of the Sabinians, Inst. 4, 8, 6, that the action for the delict of a slave is extinguished, without possibility of future revival, when the delinquent slave comes into the power of the person aggrieved.

§ 81. The death of a delinquent slave extinguished the liability of the master. Sed et mortuo servo antequam judicium accipiatur omnino hac actione non tenebitur dominus, Dig. 9, 4, 39, 4. Si quis pro servo mortuo, ignorans eum decessisse, noxale judicium acceperit, absolvi debet, quia desiit verum esse, propter eum dare oportere, Dig. 9, 4, 42, 1. 'If the slave die before an action is commenced, the master is not liable; and if an action is commenced in ignorance of his death, the master must be absolved, because his liability is at an end.'

As the Romans became more civilized the noxal surrender of a son or daughter by the parent became repugnant to public feelings, and Justinian speaks of it as a thing of the past. A filiusfamilias was only liable to execution against his estate. Incarceration for insolvency was confined to debts arising from a money loan. If a son had contracted such a debt with his father's sanction, the creditor had his remedy against the father: if the loan had not been sanctioned the debt was irrecoverable. If the father was insolvent, both son and father were liable to incarceration.

Si autem damnum ei cui deditus est servus resarcierit quaesita pecunia, auxilio praetoris invito domino manumittetur, Inst. 4, 8, 3. 'If a slave surrendered for a delict is able to indemnify the injured party, he is manumitted without the consent of his master.'

This seems originally to have been restricted to the case of a freeman surrendered for delict. Per hominem liberum noxiae deditum si tantum adquisitum sit, quantum damnum dedit, manumittere cogendus est a praetore qui noxa deditum accepit, sed fiduciae judicio non tenetur, Papinian, Collatio, 2, 3. 'On indemnification by the freeman surrendered for delict, his master is compelled by the praetor to manumit him, but cannot be sued for a trust.'

Livy relates that the consul Postumius, who, to save the Roman

army, made a treaty with the Samnites, and was sent under the Caudine Forks, was surrendered by the Romans, to discharge themselves of their liability, with all the formalities of a noxae deditio, A. D. 318, Livy, 9, 10. As Postumius had not committed a delict against the Samnites, but had made a contract with them, we may either suppose that the colouring of legality which the Romans attempted to give to their violation of the treaty was defective in this respect, or that under the old law the paterfamilias could really by noxae deditio discharge himself of liability for the contracts of those in his power by which he benefited, as well as for their delicts.

With the principle of noxal actions we may compare the law of Damni infecti (damage anticipated), which allowed the owner of a dilapidated house to exonerate himself from damages caused to his neighbours' property by surrendering the house; or the rule of English law, by which the responsibility of a shipowner for damage done without his fault to another ship or cargo was limited to the value of his ship and the freight she was earning at the time, 53 George III, c. 159.

Mischief (pauperies) occasioned by an animal might by a law of the Twelve Tables be atoned for by noxae deditio.

DE HIS PER QUOS AGERE POSSUMUS.

§ 82. *Nunc admonendi sumus agere posse quemlibet aut suo nomine aut alieno.* alieno, veluti cognitorio, procuratorio, tutorio, curatorio: cum olim, q*uo tempore erant leg*is actione*s*, in usu fuisset alter*ius* nomine agere non licere, *nisi* pro popu*lo et libertat*is *causa.*

§ 83. Cognitor autem certis verb*is* in litem cora*m* adversario substituitur. nam actor i*ta* cognitorem dat: QUOD EGO A TE verbi gratia FUNDUM PETO, IN EAM REM LUCIUM TITIUM TIBI COGNITOREM DO; ad*versarius* ita: QUANDOQUE TU A ME FUNDUM PETIS, IN EAM REM PUBLIUM MAEVIUM COGNITOREM DO. potest, ut actor ita dicat: QUOD EGO TECUM AGERE VOLO, IN EAM REM COGNITOREM DO; advers*arius* i*ta*: QUANDOQUE TU MECUM AGERE V*IS*, *IN EAM REM* COGNITOREM DO. nec

§ 82. A man may sue either for himself or for another as cognitor, procurator, guardian, curator, whereas in the days of statute-process a man could only sue for another in public suits or as an assertor of freedom.

§ 83. A cognitor for a cause is appointed by a set form of words in the presence of the adversary. The plaintiff appoints a cognitor in the following form: 'Whereas I sue you for, say, an estate, in that matter I appoint Lucius Titius as my cognitor;' the defendant thus: 'Whereas you sue me for an estate, in that matter I appoint Publius Maevius as my cognitor.' Or the plaintiff may use the words: 'Whereas I intend to sue you, in that matter I appoint Lucius Titius

interest, praesens an absens cognitor detur: sed si absens datus fu*er*it, cognitor ita erit, si cognoverit *et susce*peri*t* officium cognitori*s*.

as my cognitor;' and the defendant these: 'Whereas you intend to sue me, in that matter I appoint Publius Maevius as my cognitor.' It is immaterial whether the person named as cognitor is present or absent; but if an absent person is named, he is only cognitor if he consents and undertakes the office.

§ 84. Procurator vero *n*ullis certis verbis in litem *subst*ituit*ur*; sed ex solo mandato, et absente et ignorante adversario, constituitur. quinetiam sunt qui putant *vel eum* procuratorem videri cui non sit mandatum, si modo bona fide accedat a*d* negotium et caveat ratam rem dominum habiturum. igitur et *si non* edat mandatum pro*curato*r, *experiri potest*, quia saepe mandatum initio litis in obscuro est et postea aput iudicem ostenditur.

§ 84. A procurator is appointed in any words that amount to instructions, even in the absence and without the knowledge of the adversary. According to some, instructions are not requisite if a person undertakes the office in good faith and engages that the principal will ratify his proceeding. A procurator may commence an action without producing his instructions, and in fact the instructions are often not produced until the action is before the judex.

§ 85. Tutores autem et curatores quemadmodum constituantur, primo commentario rettulimus.

§ 85. How guardians and curators are appointed has been explained in the first book.

§ 86. Qui autem alieno nomine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personam convertit. n*am* si verbi gratia Lucius Titius *pro* Publio Maevio agat, ita formula concipitur: SI PARET NUMERIUM NEGIDIUM PUBLIO MAEVIO SESTERTIUM X MILIA DARE OPORTERE, IUDEX NUMERIUM NEGIDIUM LUCIO TITIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET, ABSOLVE. in rem quoque si agat, intendit Publii *Maevii* rem esse ex iure Quiritium, et condemnationem in suam personam convertit.

§ 86. He who sues for another names the principal in the intentio and himself in the condemnatio. If, for example, Lucius Titius sues for Publius Maevius, the formula runs thus: 'If it be proved that Numerius Negidius ought to pay to Publius Maevius ten thousand sesterces, do thou, judex, condemn Numerius Negidius to pay to Lucius Titius ten thousand sesterces; if it be not proved, absolve him.' In a real action the thing is affirmed in the intentio to be the property of Publius Maevius by the law of the Quirites, and the representative is named in the condemnatio.

§ 87. Ab adversarii quoque parte si interveniat aliquis, cum quo actio constituitur, intenditur dominum dare oportere: condemnatio autem in eius personam convertitur qui iudicium accepit. sed cum in rem agitur, nihil *in* intentione facit eius

§ 87. If the defendant is represented by a cognitor or procurator, the principal is named in a personal intentio, and his representative in the condemnatio. In a real action neither the principal defendant nor his representative is named in the

persona cum quo agitur, sive suo nomine sive alieno aliquis iudicio interveniat: tantum enim intenditur rem actoris esse.

intentio, which only affirms the proprietorship of the plaintiff.

§ 82. If there is a genuine antithesis between suo nomine and alieno nomine, the procuratorium, tutorium, &c., nomen, which is the alienum nomen with which the procurator or guardian sues, must mean the name, not of the procurator or guardian, but of the principal or ward. When a man sues suo nomine he uses his own name in the intentio, therefore when a man sues procuratorio nomine he uses the procuratorium nomen in the intentio. But the name inserted in the intentio by a procurator is not the name of the procurator, but that of the principal.

Eam popularem actionem dicimus quae suum jus populo tuetur, Dig. 47, 23, 1. 'A public action is one which defends the interest of the people.' A popularis actio was one brought by a common informer to recover a penalty. The informer enforced, not a private but a public right, that is, sued as the procurator of the people; and therefore an infamis, as he was disabled from being procurator, was incompetent to prosecute in such an action. To public actions and actions by an assertor libertatis Justinian adds, as maintainable by a representative under the old jurisprudence, actions in behalf of a ward. We have already mentioned, page 119, that until the ward attained the age of seven the guardian acted in the name of the ward; after the age of seven the ward acted with the authority of the guardian.

§ 84. A person who without instructions (mandatum) officiously interposed and undertook the defence of an absent neighbour was called negotiorum gestor, or defensor, or procurator voluntarius. The employment of a cognitor, from the necessity of appointing him in the presence of the adversary and by a certain formula, was discontinued as inconvenient, and Justinian only speaks of the procurator.

DE SATISDATIONIBUS.

§ 88. Videamus nunc quibus ex causis is cum quo agitur vel hic qui *agit cogatur* satisdare.

§ 88. We next inquire under what circumstances the plaintiff or defendant is required to give security.

§ 89. Igitur si verbi gratia in

§ 89. If I sue you in a real action

rem tecum agam, satis mihi dare debes. aequum enim visum est te ideo quod interea tibi rem, quae an ad te pertineat dubium est, possidere conceditur, cum satisdatione mihi cavere, ut si victus sis, nec rem ipsam restituas nec litis aestimationem sufferas, sit mihi potestas aut tecum agendi aut cum sponsoribus tuis.

you must give me security. As you are permitted during the suit to retain possession of a thing to which your title is doubtful, it is fair that you should give me security with sureties so that if judgment goes against you and you refuse to restore the thing or to pay its value I may have the power of proceeding against you or your sponsors.

§ 90. Multoque magis debes satisdare mihi, si alieno nomine iudicium accipias.

§ 90. And there is all the more reason that you should give security if you are only the representative of another.

§ 91. Ceterum cum in rem actio duplex *sit* (aut enim per formulam petitoriam agitur aut per sponsionem): si quidem per formulam petitoriam agitur, illa stipulatio locum habet quae appellatur iudicatum solvi: si vero per sponsionem, illa quae appellatur pro praede litis et vindiciarum.

§ 91. A real action is either commenced by a real formula or by sponsio: if by real formula, stipulation is called security for satisfaction of judgment; if by sponsio, security in lieu of warranty for property and interim possession.

§ 92. Petitoria autem formula haec est qua actor intendit rem suam esse.

§ 92. The Intentio of a real formula asserts the proprietorship of the plaintiff.

§ 93. Per sponsionem vero hoc modo agimus. provocamus adversarium tali sponsione: SI HOMO QUO DE AGITUR EX IURE QUIRITIUM MEUS EST, SESTERTIOS XXV NUMMOS DARE SPONDES? deinde formulam edimus qua intendimus sponsionis summam nobis dare oportere. qua formula ita demum vincimus, si probaverimus rem nostram esse.

§ 93. In a sponsio we challenge the defendant to a wager as follows: 'If the slave in question belongs to me by the law of the Quirites, do you promise to pay me twenty-five sesterces?' and we then deliver a formula in which we sue for the sum named in the wager, and obtain judgment if we prove our proprietorship.

§ 94. Non tamen haec summa sponsionis exigitur: nec enim poenalis est, sed praeiudicialis, et propter hoc solum fit, ut per eam de re iudicetur. unde etiam is cum *quo agitur non restipulatur*: ideo autem appellata est PRO PRAEDE LITIS VINDICIARUM stipulatio, *quia* in locum praedium successit; quia olim, cum lege agebatur, pro lite et vindiciis, id est pro re et fructibus, a possessore petitori dabantur praedes.

§ 94. But the sum named in the wager is not exacted, for it is not penal, but prejudicial, and the wager is merely a device for instituting a trial of ownership. Accordingly, the defendant does not exact a counter promise from the plaintiff. The name of security in lieu of warranty for property and interim possession is derived from the warrantors which it superseded; for in the days of statute-process restitution of the thing in dispute and the mesne profits was

secured to the plaintiff by the engagement of the defendant's warrantors.

§ 95. Ceterum si aput centumviros agitur, summam sponsionis non per formulam petimus, sed per legis actionem: sacramento enim re*um* provocamus; eaque sponsio sestertiorum CXXV nummorum fit, *scilicet* propter legem . . . .

§ 95. In the centumviral court the sum of the wager is not sued for by formula but by statute-process. We challenge the defendant to deposit a stake of a hundred and twenty-five sesterces, the amount fixed by the lex . . . .

§ 96. Ipse autem qui in rem agit, si suo nomine agit, satis non dat.

§ 96. In a real action a plaintiff who sues in his own name gives no security.

§ 97. Ac nec si per cognitorem quidem aga*tur*, ulla satisdatio vel ab ipso vel a domino desideratur. cum enim certis et quasi sollemnibus verbis in locum domini substituatur cognitor, merito domini loco habetur.

§ 97. And if a cognitor sues, no security is required either from him or from his principal, for the cognitor, being appointed by certain sacramental terms, is identified with the principal.

§ 98. Procurator vero si agat, satisdare iubetur ratam rem dominum habiturum: periculum *enim est*, ne iterum domin*us* de eadem re experiatur. quod periculum *non* intervenit, si per cognitorem actum fuit; quia de *q*ua re quisque per cognitorem egerit, de ea non magis amplius actionem habet quam si ipse egerit.

§ 98. But if a procurator sues, he is required to give security for the ratification of his proceedings by his principal, as otherwise the principal might sue again on the same claim, which he cannot do after suing by a cognitor.

§ 99. Tutores et curatores eo modo quo et procur*atores* satisdare debere verba edicti faciunt. sed aliquando illis satisdatio remittitur.

§ 99. Guardians and curators are required by the edict to give the same security as procurators, but are sometimes excused.

§ 100. Haec ita si in rem agatur: si vero in personam, ab actoris quidem parte quando satisdari debeat quaerentes, eadem repetemus quae diximus in actione qua in rem agitur.

§ 100. So much for real actions. In personal actions the plaintiff is governed by the same rules as in real actions.

§ 101. Ab eius vero parte cum quo agitur, si quidem alieno nomi*ne* aliquis interveniat, omnimodo satisdar*i* debet, quia nemo alienae rei sine satisdatione defensor idoneus intellegitur. sed si quidem cum *cognit*ore agatur, dominus satisdare iubetur; si vero cum procuratore, ipse procurator. idem et de tutore et de curatore iuris est.

§ 101. If the defendant is represented by another person, security must always be given, for no one is allowed to defend another without security: but in a suit against a cognitor it is the principal who gives security; in a suit against a procurator the procurator gives security; and the same applies to guardians and curators.

§ 102. Quod si proprio nomine aliquis iudicium *accipiat* in personam, certis ex causis satisdari solet, quas ipse Praetor significat. quarum satisdationum duplex causa est. nam aut propter genus actionis satisdatur, aut pro*pter* persona*m*, quia suspecta sit. propter genus actionis, velut iudicati depensive, aut cum de moribus mulieris agetur: propter personam, velut si cum eo agitur qui decoxerit, cuiusve bona *a* creditoribus possessa proscriptave sunt, sive cum eo herede agatur quem Praetor suspectum aestimaverit.

§ 102. If the defendant is sued in his own name, in a personal action, he only gives security in certain cases named in the edict. These cases are of two kinds, depending either on the nature of the action or on the character of the defendant. The nature of the action is the reason in a suit against a judgment debtor, or a principal indebted to his surety, or a husband who retains a portion of the dower of his divorced wife on the plea of immorality. The character of the defendant is the reason if he has been insolvent, or if his goods have been possessed or proscribed for sale by his creditors, or if he is a successor whom the praetor pronounces to be open to suspicion.

§ 88. In a real action the defendant was required to give security; in a personal, with a few exceptions, if he appeared in his own cause, he was not required. Justinian relieved him of the necessity in real actions.

In the time of Gaius if the defendant in a real action refused to give security, judicatum solvi, the possession was transferred from him to the plaintiff by the interdict Quem fundum, Quam hereditatem, or Quem usumfructum, as the case might be, and he was reduced to the position of plaintiff. Sunt etiam interdicta duplicia tam adipiscendae quam recuperandae possessionis; qualia sunt interdicta QUEM FUNDUM et QUAM HEREDITATEM. Nam si fundum vel hereditatem ab aliquo petam, nec lis defendatur, cogitur ad me transferre possessionem, sive nunquam possedi, sive antea possedi deinde amisi possessionem, Fragment of Ulpian's Institutions of Civil Law. 'Some interdicts may either initiate or restore possession, as the interdicts Quem fundum and Quam hereditatem. For if I sue a person for land or an heritage, and he refuses to give security, he is compelled to transfer the possession to me whether I never before had possession, or once had and afterwards lost possession.' Sicut corpora vindicanti, ita et jus, satisdari oportet, et ideo necessario ad exemplum interdicti; QUEM FUNDUM, proponitur etiam interdictum, QUEM USUMFRUCTUM vindicare velit, de restituendo usufructu, Ulpian, Fragmenta Vaticana, 92. 'The plaintiff has a

right to security in a real action for a servitude as well as for a corporal thing, and therefore, analogous to the interdict, Quem fundum, there is an interdict, Quem usumfructum, for the transfer of a usufruct.' Quoties hereditas petitur, satisdatio jure desideratur; et si satisdatio non detur, in petitorem hereditas transfertur. Si petitor satisdare noluerit, penes possessorem possessio remanet; in pari enim causa potior est possessor, Paulus, Receptae Sententiae, 1, 11, 1. 'In a demand of a heritage, security must be given, or else possession is transferred to the demandant. If the demandant refuse to give security, possession remains with the tenant, for in equal circumstances law favours the possessor.'

The same rule applied to Praedial servitudes. If A asserted against B the Urban servitude altius Non tollendi (si ageretur, jus vicino non esse, aedes altius tollere), i. e. sought by actio Confessoria of jus altius Non tollendi (with an intentio, perhaps, in the following form: Si paret jus Numerio Negidio non esse aedes altius tollendi invito Aulo Agerio) to restrain B from exercising the indefinite powers of ownership by raising the height of his house, B might decline to defend the action and thus avoid a judicial decision as to the existence of the servitude: but as a penalty for this he was not allowed afterwards to exercise his alleged right without first proving before a tribunal the nullity of A's claim: proving, that is, either that A never had such a servitude over the house of B, or that B had extinguished it by acquisition of the counter-servitude (libertatis usucapio). That is to say, being originally in possession, or rather quasi-possession of his right (for servitudes are subjects of quasi-possession), B was put out of possession; and, if he afterwards wished to exercise his right of building, had first to recover possession of it as plaintiff in a suit: i. e. by actio Negatoria of jus Non altius tollendi, if he denied that A as dominans ever enjoyed such a servitude, or by actio Confessoria of jus altius tollendi if he claimed as serviens to have reacquired the freedom of his house by usucapio libertatis (in either case, perhaps, with an intentio in the following form: Si paret jus Aulo Agerio esse aedes altius tollendi invito Numerio Negidio).

The penalty would only consist in an inversion of the order of proof: B as plaintiff would have to prove his own proprietorship before A as defendant was put to prove the existence of the servitude: whereas, if A had been plaintiff, A would have had to begin

by proving the existence of the servitude before B was put to his answer.

So vice versa: if B had originally wished to prove his right to build as plaintiff, either in an actio Negatoria of jus Non altius tollendi, or in an actio Confessoria of jus altius tollendi; and if A had declined to defend either action by giving securities, &c. in the course prescribed by law; A would have been restrained from afterwards interfering with B except as plaintiff in a suit in which B was made defendant, Dig. 39, 1, 15.

The sum staked in the praedes sacramenti, which Gaius had told us, § 14, was a thousand or five hundred asses, he now, § 95, defines as one hundred and twenty-five sesterces.

The explanation of this is as follows: Originally the sestertius, as the name implies, was two asses and a half, and the denarius ten asses. Both the sestertius and the denarius were silver coins. In the second Punic War, about B.C. 217, in consequence of the insolvency of the State, the denarius was made equal to sixteen asses and the sestertius remained, as before, one fourth of the denarius, that is, became equal to four asses. One hundred and twenty-five sesterces, therefore, were equal to five hundred asses.

The Sponsio praejudicialis, though a personal action in form, might be in effect a real action. It resembled the Feigned Issue or issue in a fictitious action on a wager, whereby the Court of Chancery, before it had the power of summoning a jury might refer an issue of fact to trial by jury, or the parties in a court of law by consent or by direction of some act of parliament might determine some disputed right without the formality of a regular action, thereby saving much time and expense, Stephen's Commentaries, 5, 14. In the Sponsio poenalis there was both a sponsio and restipulatio, that is, both parties forfeited the penal sum if they lost the action, and the penal sum was serious, in an action de pecunia certa credita being one third and in an action de pecunia constituta being one half of the sum in dispute, § 171.

In the Sacramentum and Sponsio two different stipulations must be distinguished. In the Sacramentum there was (A) the praedes sacramenti, and (B) the praedes litis et vindiciarum; in the Sponsio there was (A) the sponsio praejudicialis, and (B) the satisdatio pro praede litis et vindiciarum. In the formula petitoria there was only one stipulation, (B) the satisdatio judicatum solvi,

corresponding to the second stipulation in the Sacramentum and Sponsio.

In a judicium Cascellianum for recovering possession, § 166, and fructus, § 167, or a Sponsio based on the interdicts Uti possidetis and Utrubi fuit, both parties being originally both plaintiff and defendant, there were (A) two sponsiones and two restipulationes for a penal sum; there was no security (B) corresponding to the security Pro praede litis et vindiciarum; but (C) a fructuaria Stipulatio, § 166, for a penal sum equal to the value of the mesne profits; or, as an alternative, a Satisdatio judicatum solvi, § 169, contemplating an action (judicium fructuarium) based on the Licitatio or auction of the fruits.

Belonging, apparently, to the formalities of Sponsio was a proceeding which has caused commentators on Roman law no little embarrassment—Deductio quae moribus fit. It is mentioned in connection with litigation respecting land by Cicero, Pro Tullio and Pro Caecina, and in the latter oration is called Vis ex conventu. We therefore may venture to identify Deductio with the Vis mentioned by Gaius, § 170, as forming part of the process in Uti possidetis and other prohibitory interdicts. In real action whether by Sponsio or by Vindicatio (formula petitoria) it would be necessary, if the fact of possession was contested, to determine who should have the interim possession, and this point would be decided by means of a preliminary Sponsio based on Uti possidetis. Interim possession would be awarded to the party who had actual possession, and the fact of actual possession would be tried on an action (Sponsio) brought on a preconcerted trespass (vis ex conventu). The following would be the successive stages of procedure. An interdict Uti possidetis would be obtained from the praetor: a fictitious ejectment (Deductio, Vis ex conventu) would take place by arrangement between the parties: a Sponsio would be made to ascertain which of the parties had herein contravened the interdict; and according to the issue of this Sponsio one of the parties would be put into interim possession: finally the judex would have to adjudicate, either on a formula petitoria or on another Sponsio involving the question of ownership.

§ 98. We have an allusion to the security of a procurator plaintiff in the Brutus, where the negotiorum gestor is called voluntarius procurator. Mihi quoque, inquit Brutus, expectanda sunt ea quae Attico polliceris, etsi fortasse ego a te hujus volun-

tarius procurator petam quod ipse cui debes se incommodo exacturum negat. At vero inquam, tibi ego, Brute, non solvam nisi prius a te cavero amplius eo nomine neminem cujus petitio sit petiturum, Brutus, 4. 'I too, said Brutus, must wait for what Atticus is promised, but perhaps I shall sue as volunteer procurator for the payment, which the principal says he will leave to your convenience. Then I shall not pay you, Brutus, said I, unless you first give me security that no one entitled to sue shall sue me on that account a second time.'

§ 102. The husband sued for the dower of his divorced wife might retain a portion on various grounds, of which Immorality was one. Retentiones ex dote fiunt aut propter liberos, aut propter mores, aut propter impensas, aut propter res donatas, aut propter res amotas. Propter liberos retentio fit, si culpa mulieris aut patris in cujus potestate est divortium factum sit: tunc enim singulorum liberorum nomine sextae retinentur ex dote; non plures tamen quam tres .... Morum nomine graviorum quidem sexta retinetur; leviorum autem octava. Graviores mores sunt adulteria tantum; leviores omnes reliqui, Ulpian, Liber Regularum, 6, 9. 'Retentions in the restitution of dower are on account of children, immorality, expenditure, donation, articles purloined by the wife. On account of children, if the fault of the wife, or the father in whose power she is, occasioned the divorce. Then a sixth is retained on account of each child, but not more than three sixths altogether. For gross immorality a sixth is retained, for slight immorality an eighth. Only adultery is gross immorality.'

The circumstances under which security judicatum solvi was required of a defendant are illustrated in Cicero's oration for Quintius. Naevius had a demand against Quintius, and alleged that Quintius had committed an act of bankruptcy by breaking an engagement to appear before the praetor (vadimonium judicio sisti), and on this ground obtained from the praetor a missio in possessionem in pursuance of the edict. Praetor ait: In bona ejus qui judicio sistendi causa fidejussorem dedit, si neque potestatem sui faciat neque defendetur, iri jubebo, Dig. 42, 4, 2. 'If a defendant give security to appear and neither appears nor is defended, I will put the plaintiff in possession of his goods.' Accordingly, when Quintius was afterwards willing to defend an action, Naevius required that he should give security judicatum solvi, § 103. Defendere debitorem sicut ante quam bona ejus possiderentur licet,

ita post bonorum quoque possessionem ejus, sive ipse sui sive alius defensionem ejus suscipiat, debet satisdare, ut satisdatione interposita judicium accipiatur et a possessione discedatur, Dig. 42, 5, 33, 1. 'Missio in possessionem is prevented by the appearance of a defensor, and after bonorum possessio the debtor or a defensor may, on giving security judicatum solvi, defend the action, and put an end to the possessio.' Quintius refused to give this security on the ground that he had broken no vadimonium, and committed no act of bankruptcy, and that his goods had consequently not been legally possessed. The praetor directed a sponsio praejudicialis to try this preliminary question: Jubet P. Quintium sponsionem cum Sexto Naevio facere: Si bona sua ex edicto P. Burrieni praetoris dies triginta possessa non essent: and against the ordinary rule that a man should not be required to prove a negative, made Quintius the plaintiff in the sponsio. In the absence of Quintius, a friend had appeared (voluntarius procurator), who volunteered to undertake his defence, and thus prevent the missio in possessionem; but he was not allowed by the praetor, because he declined to enter into the security judicatum solvi, Cicero, Pro Quintio.

Besides the forfeiture of a vadimonium, fraudulent absconding to avoid the summons to appear was an act of bankruptcy, or motive for missio in possessionem. Praetor ait: Qui fraudationis causa latitabit, si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo, Dig. 42, 4, 7, 1. 'If a debtor fraudulently abscond, and no sufficient representative defends him, I will order his goods to be possessed and sold.'

A heres might, on cause shown to the praetor, immediately after his entry on the succession, be required by the creditors to give security for the payment of their claims, with the alternative of seizure and sale, on the mere ground of poverty, § 102. But after a lapse of time it was necessary to prove not only poverty, but fraudulent behaviour on the part of the heres, Dig. 42, 5, 31.

The stipulation judicatum solvi contained three clauses: Judicatum solvi stipulatio tres clausulas in unum collatas habet: de re judicata, de re defendenda, de dolo malo, Dig. 46, 7, 6. 'The stipulation judicatum solvi is composed of three clauses, for satisfaction of the judgment, for defending the action, and against malicious deterioration in case of restitution.' The action must be defended 'to the satisfaction of a reasonable man,' which was interpreted to mean that, if a defensor appeared before the judex,

the second clause was not satisfied unless the defensor was prepared to give further security judicatum solvi. Si vero extrinsecus persona defensoris interveniat, aeque stipulatio non committetur, si modo ille paratus sit rem boni viri arbitratu defendere, hoc est satisdare, Dig. 46, 7, 5. 'A defensor may prevent a forfeiture of the stipulation if he defends "to the satisfaction of an arbitrator," that is, with adequate security.'

Justinian relieved the defendant in any action who appeared in his own person from the first and third clauses of the security judicatum solvi, but not from the second. The vadimonium or cautio judicio sistendi, which originally, it seems, only referred to adjourned appearances in jure, was at this period extended to the judicia, and bound the defendant to appear before the judex and remain to the end of the trial. If, then, in consequence of an adjournment in jure, there had been a vadimonium between the parties, no further stipulation would be necessary; otherwise the defendant would have had to enter into the undertaking that formed the second clause of the stipulation judicatum solvi. Sed haec hodie aliter observantur. . Sive enim quis in rem actione convenitur sive in personam suo nomine, nullam satisdationem pro litis aestimatione dare compellitur, sed pro sua tantum persona quod in judicio permaneat usque ad terminum litis, Inst. 4, 11, 2. 'This is not the present rule. The defendant now is not required either in a real or personal action, if he appear in person, to give security for satisfaction of the judgment, but only for his own personal presence and continuance in court to the end of the trial.'

The procurator of the plaintiff appointed before the judex or in the record office of the magistrate by memorandum (insinuatio) in the register of his public proceedings (apud acta) was assimilated to the cognitor whom he superseded, and was not required to give security; otherwise he had to give security ratam rem dominum habiturum.

The procurator of the defendant gave no security; but his principal, as fidejussor of his procurator, gave security for the procurator judicatum solvi, including a mortgage (hypotheca) of all his property. A defensor (unauthorized representative) of the defendant gave security judicatum solvi.

DE IUDICIIS LEGITIMIS ET QUAE IMPERIO CONTINENTUR.

§ 103. Omnia autem iudicia aut legitimo iure consistunt aut imperio continentur.

§ 104. Legitima sunt iudicia quae in urbe Roma vel intra primum urbis Romae miliarium inter omnes cives Romanos sub uno iudice accipiuntur: eaque *e* lege Iulia iudici*aria*, nisi in anno et sex mensibus iudicata fuerint, expirant. et hoc est quod vulgo dicitur, e lege Iulia litem anno et sex mensibus mori.

§ 105. Imperio vero continentur recuperatoria et quae sub uno iudice accipiuntur interveniente peregrini persona iudicis aut litigatoris. in ea*dem* causa sunt quaecumque extra primum urbis Romae miliarium tam inter cives Roman*os* quam inter peregrinos accipiuntur. ideo autem imperio contineri iudicia dicuntur, quia tamdiu valent, quamdiu is qui ea praecepit imperium habebit.

§ 106. Et siquidem imperio continenti iudicio actum fuerit, sive in rem sive in personam, sive ea formula q*uae* in factum concepta est sive ea quae in ius habet intentionem, postea nihilominus ipso iure de eadem re agi potest. et ideo necessaria est exceptio rei iudicatae vel in iudicium deductae.

§ 107. At vero *si* legitimo iudicio in personam actum sit ea formula quae iuris civilis habet intentionem, postea ipso iure de eadem re agi non potest, et ob id exceptio supervacua est. si vero vel in rem vel in factum actum fuerit, ipso iure nihilominus postea agi potest, et ob id exceptio necessaria est rei iudicatae vel in iudicium deductae.

§ 103. Actions are either statutable or supported by magisterial power.

§ 104. Statutable actions are those that are instituted at Rome, or within the first milestone, between Roman citizens, before a single judex; and these by the lex Julia judiciaria expire in a year and six months from their commencement, unless previously decided; which is the meaning of the saying that by the lex Julia an action dies in eighteen months.

§ 105. Magisterial power supports those actions that are instituted before recuperators, or before a single judex, if the judex or a party is an alien, or beyond the first milestone, whether the parties are citizens or aliens. They are said to be upheld by magisterial power because they can only be prosecuted as long as the praetor who delivered the formula continues in office.

§ 106. The institution of an action binding by magisterial power, whether it was real or personal, and whether it had a formula of fact or an allegation of law, is not an extinctive bar (§ 115) to the institution of a subsequent action on the same question: which must be repelled by a counteractive plea alleging the previous decision or litigation.

§ 107. But the institution of a statutable personal action with an Intentio of civil law, is an extinctive bar to a subsequent action on the same question, and a counteractive plea is not required. The institution of a statutable real action or a statutable personal action with a formula of fact, is no extinctive bar to a subsequent action on the same question, and the counteractive

plea of previous decision or litigation is necessary.

§ 108. Alia causa fuit olim legis actionum. nam qua de re actum semel erat, de ea postea ipso iure agi non poterat: nec omnino ita, ut nunc, usus erat illis temporibus exceptionum.

§ 108. It was otherwise anciently with the forms of statute-process, when a subsequent action on the same question was always extinctively barred, and counteractive pleas were unknown to the code of procedure.

§ 109. Ceterum potest ex lege quidem esse iudicium, sed legitimum non esse; et contra ex lege non esse, sed legitimum esse. *nam si* verbi gratia ex lege Aquilia vel Ouinia vel Furia in provinciis agatur, imperio continebitur iudicium: idemque iuris est et si Romae aput recuperatores agamus, vel aput unum iudicem interveniente peregrini persona. et ex diverso si ex ea causa, ex qua nobis edicto Praetoris datur actio, Romae sub uno iudice inter omnes cives Romanos accipiatur iudicium, legitimum est.

§ 109. An action may be founded on statute and yet not be statutable, or statutable and yet not founded on statute. For instance, an action founded on the lex Aquilia, or Ovinia, or Furia, if instituted in the provinces, determines with the praetorship, and so it does if instituted at Rome before recuperators, or though instituted before a single judex, if the judex or a party is an alien; and, on the contrary, an action founded on the edict, if instituted at Rome, before a single judex, between Roman citizens, is statutable.

Imperium and Jurisdictio were the two component parts of Officium jus dicentis, i.e. the power of the magistrate (consul, praetor, curule edile) charged with the administration of civil justice.

Of these two elements, Jurisdictio denoted the power (perhaps originally vested in the Pontifex) of administering the civil law in the ordinary course of procedure. It consisted chiefly in presiding over the preliminary stages of litigation, and in the period of legis actiones was summed up in the utterance of the solemn words, Do, Dico, Addico; but in the formulary period it was performed, not by oral utterances, but by the delivery of written documents (verbis conceptis). In genuine litigation it was called jurisdictio contentiosa; in fictitious litigation, e.g. manumission by vindicta, alienation by in jure cessio, it was called jurisdictio voluntaria.

Imperium as coupled with the administration of civil justice (imperium quod jurisdictioni cohaeret, Dig. 1, 21, 1), or as including it (cui etiam jurisdictio inest, Dig. 2, 1, 3), was called imperium mixtum, as opposed to imperium merum, or gladii potestas,

the administration of criminal justice. Imperium mixtum may be divided into two functions, (1) cognitio extraordinaria and (2) actiones honorariae.

(1) Magistrates invested with imperium had the power of issuing commands (jus decernendi) to which they enforced obedience by fine (mulcta), distress (pignus), and imprisonment, and, as a preliminary to issuing a command (decretum), of summoning parties before them (vocatio), by means of a lictor, and conducting in person an investigation of facts (causae cognitio). To these functions of the praetor must be referred Restitutio in integrum, Missio in possessionem, and other proceedings which the praetor decided in person without reference to a judex, a form of procédure which finally superseded the ordo judiciorum or formulary system.

(2) But even of suits belonging to the ordo judiciorum, which conformed, that is, to the principle of appointing a judex, a portion must be referred to the praetor's imperium. All the new actions, unknown to the civil law, which the praetor invented in virtue of the powers conferred by the law of uncertain date that introduced the formulary system, the lex Aebutia; all fictitious actions and actions in factum; in a word, all actiones honorariae, were emanations of the praetorian imperium.

Jurisdictio is sometimes used in a wider sense as equivalent to officium jus dicentis: and then Lex and Jurisdictio form an antithesis similar to that which is formed by Jurisdictio in the narrower sense and Imperium: the antithesis, namely, of Legislator and Administrator.

This antithesis is the principle of many of the divisions or classifications in Roman jurisprudence and is expressed in various terms. We have jus legitimum opposed to jus praetorium, 4 § 34: jus legitimum opposed to praetoris jurisdictio, 4 § 111: jus civile opposed to jus praetorium or jus honorarium, Dig. 1, 1, 7: actio legitima opposed to actio honoraria, Dig. 35, 2, 32, pr. and Collatio, 2, 5, 5: actio legitima opposed to actio utilis, Dig. 39, 3, 22, 2: actio civilis opposed to actio honoraria (omnes actiones aut civiles dicuntur aut honorariae) Dig. 44, 7, 25, 2, and Dig. 50, 16, 178, 3: actiones quae ipso jure competunt opposed to actiones quae a praetore dantur, 4 § 112: actiones quae ex legitimis et civilibus causis descendunt opposed to actiones quas praetor ex sua jurisdictione comparatas habet, Inst. 4, 6, 3: actio civilis and obligatio civilis opposed to actio in factum a praetore danda, Dig. 2, 14, 7, 2:

actio civilis opposed to interdictum, Dig. 43, 26, 14: and lex opposed to praetor (actionum modus vel lege vel per praetorem introductus), Dig. 50, 17, 27.

Although the division into judicia legitima and judicia imperio continentia does not exactly coincide with the division into actiones legitimae and actiones honorariae (e. g. an actio in factum if litigated at Rome before a Roman judex by two Romans would be judicium legitimum, and, vice versa, an actio civilis if litigated before recuperators or in the provinces or between aliens would be judicium imperio continens, § 109); yet it is essentially the same, being based on the same antithesis of the Legislator and the Executive.

Statutory actions (judicia legitima), so named from the lex Julia judiciaria, the statute by which they were defined, had by that statute a pendency of eighteen months. After that period they could neither be prosecuted nor renewed, as the right of action was consumed by res in judicium deducta. If the delay was caused by the defendant the plaintiff had a remedy by an action De dolo, Dig. 4, 3, 18, 4. Actions binding (continentia) by magisterial power had a still shorter pendency, the commission of the judex only continuing in force so long as the praetor who appointed him, and who himself was only appointed for a year, continued in office.

It is difficult to reconcile this account of the prescription or limitation of legal process with what we read of the duration of some controversies. Martial speaks of a cause that had been litigated in the three Fora, the Forum Romanum, the Forum Julium, and the Forum Augustum, for twenty years:

Lis te bis decimae numerantem frigora brumae
Conterit una tribus, Gargiliane, foris.
Ah miser et demens! viginti litigat annis
Quisquam cui vinci, Gargiliane, licet? 7, 65.

Bethmann-Hollweg, § 80, suggests that the limitation did not apply to Centumviral suits nor to Cognitio extraordinaria; and that any litigation might be protracted by a series of appeals.

This limit to the duration of legal proceedings, though it has left some traces in the Digest, was obsolete long before Justinian. Theodosius limited the pendency of actions to thirty years, Cod. Theod. 4, 14, 1: i. e. he ordained that as the right of action

expired unless Litis contestatio took place within thirty years from the nativity of an action; so, after Litis contestatio, an interval of thirty years after any act of the judge or one of the parties should be a bar to any further prosecution of the action. Justinian extended this period to forty years, Cod. 7, 39, 9.

The expiration of the commission of the judex by the expiration of the functions of the praetor who appointed him suggests a reference to 1 Geo. 3, c. 23; by which act judges are continued in their offices notwithstanding any demise of the crown, which was formerly held to vacate their seats.

The division of actions into those with a pendency of eighteen months (judicia legitima) and those which expire with the praetorship (judicia imperio continentia) is not coincident with the division into those which are ipso jure extinctive of future litigation and those which are merely counteractive ope exceptionis, § 106. For although all judicia imperio continentia, whether in jus or in factum, are merely counteractive; some judicia legitima, i. e. real actions and actiones honorariae, are not ipso jure extinctive, § 107. Gaius, therefore, was guilty of an inaccuracy when, 3 §§ 180, 181, he identified the two divisions.

The reason why real actions and actions in factum had not the same power of Novation as personal actions in jus was probably, as Heffter has suggested, as follows: Under the legis actiones, § 108, the same question could not be the subject of a second trial. The lex Aebutia, which abolished the two legis actiones, denominated condictio and judicis postulatio, and established in their stead the judicia and arbitria of the formulary system, probably enacted that these should have the same power of novation, 3 § 180, as the actions which they superseded, provided they were instituted between Roman citizens before a single judex, and within the first milestone. Proceedings, therefore, thus defined, when once instituted, extinguished the plaintiff's right of action. The provision of the lex Aebutia, however, was not interpreted as applicable to actions in factum; for actions in factum were used precisely in those cases where no right was recognized by the civil law, that is, where no right was enforceable by statute-process. Nor was it applied to Real actions, for these were left by the lex Aebutia to be decided by the sacramentum, and though they were finally absorbed by the formulary system, no law, apparently, ever enacted that in these cases the formulary procedure should have the same

effect as the legis actio, and extinguish ipso jure the plaintiff's right of action. In Real actions and actions in factum, therefore, even though in other respects they were legitima, that is, fell under the definition of the lex Aebutia, the defendant required the protection of the exceptio rei judicatae. The result is, that some actions which were statutable so far as pendency was concerned, inasmuch as they fell under the statute called lex Julia, were not statutable so far as novation was concerned, inasmuch as they fell outside the statute called lex Aebutia.

§ 109. The nature of the lex Ovinia is not known.

The same imperium mixtum whence emanated new actions in favour of the plaintiff also issued exceptions in favour of the defendant, and in particular the exceptio rei judicatae, which supplemented the novation or consumption whereby a right of action was extinguished or annihilated (ipso jure, § 106). The aim of the legislator in barring once-used rights of action by consumption (novatio) or exceptio rei judicatae, was to protect a defendant from being harassed by successive suits, and to guard against the public evil which would arise in the shape of a general unsettlement and uncertainty of rights if judicial decisions were not conclusive. Singulis controversiis singulas actiones unumque judicati finem sufficere probabili ratione placuit, ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem, maxime si diversae pronuncientur, Dig. 44, 2, 6. 'That one right of action should only be tried once is a reasonable rule to prevent interminable litigation and the embarrassment of contrary decisions.' Accordingly, it was adopted as a maxim that (in the absence of appeal or after appeal) judicial decisions should be assumed to be true. Res judicata pro veritate accipitur, Dig. 1, 5, 25. The principle may be stated more at length as follows: A judgment shall not be contradicted by a judgment in a subsequent trial between the same parties where the same right is in question (except, of course, by the judgment of a court of appeal). Exceptio rei judicatae obstat quotiens inter easdem personas eadem quaestio revocatur vel alio genere judicii, Dig. 44, 2, 7, 4. 'The plea of previous judgment is a bar whenever the same question of right is renewed between the same parties by whatever form of action.' Let us consider more minutely the import of this rule.

The parties must be the same. Res inter alios judicatae nullum aliis praejudicium faciunt, Dig. 44, 2, 1. 'A judgment be-

tween certain parties does not determine the rights of other parties.'

This is subject to certain exceptions. For instance, a judgment is conclusive not only against the parties but also against their successors, whether universal or particular, Cod. 8, 36, 2. A judgment in a suit litigated by the father respecting the status (legitimacy) of a child is conclusive on all the world. A mortgagee, purchaser, husband, are bound by the judgment in a suit litigated by the mortgagor, vendor, donor of dower, Dig. 42, 1, 63. A suit between a testamentary heir and the heir by intestacy binds the legatees and the manumissi who accordingly are entitled to be made parties and to appeal. In these cases the judex is said to establish jus, i. e. jus inter omnes, not merely jus inter partes: Placet enim ejus rei judicem jus facere, Dig. 25, 3, 3, pr.: Jus facit haec pronuntiatio, Dig. 30, 1, 50, 1.

The form of action is immaterial provided that the same right is contested. Thus a depositor, lender, pledgor, may recover damages for injury to the thing deposited, lent, or pledged, either by action on his contract or under the lex Aquilia, but if cast in one, he cannot bring the other.

It is otherwise if the right contested is really different; if in one action a plaintiff claims a jus in rem, in the other a jus in personam. Paulus respondit, ei qui in rem egisset nec tenuisset, postea condicenti non obstare exceptionem rei judicatae, Dig. 44, 3, 31. 'If a plaintiff after losing a real action brings a personal action, he is not barred by the plea of previous judgment.'

The term 'the same right' must be taken to include a right and its correlative obligation; in other words, it is immaterial that the position of plaintiff and defendant is inverted. Si quis rem a non domino emerit, mox petente domino absolutus sit, deinde possessionem amiserit, et a domino petierit, adversus exceptionem: Si non ejus sit res, replicatione hac adjuvabitur: At si res judicata non sit, Dig. 44, 2, 24. 'A purchaser of a thing from a non-proprietor, sued for it by the true proprietor and acquitted, afterwards losing possession thereof, and seeking (by actio Publiciana, 2 § 43) to recover it from the former proprietor, may meet the exception by which he pleads true dominion by the replication of previous judgment.' This example further shows that the plea, though invented chiefly to protect defendants, is sometimes available for plaintiffs.

When the same right is in question it is immaterial that the subject or secondary object (2 § 1, commentary) of the right is different. Thus, a plaintiff claiming to be heir, who fails when he brings hereditatis petitio for Blackacre, cannot afterwards bring hereditatis petitio for Whiteacre as a part of the same inheritance. Of course, if there is no question of hereditas, the difference of Subject involves a different right of Ownership: and the Vindicatio by which a man claims Blackacre is not barred by a previous Vindicatio in which he claimed Whiteacre.

Perhaps the same right may be in question even when the primary object, the benefit which the right immediately contemplates, is different. Thus, a plaintiff who fails in a condictio furtiva brought to recover stolen property, cannot afterwards maintain an actio furti to recover a penalty for theft. We might say that the plaintiff has a single compound right, to recover his property and to recover a penalty, but perhaps it is more accurate to say that he has two separate rights which, however, stand or fall together by necessary implication, and to bring this case under the following head.

It is immaterial, namely, whether a proposition was decided as the final question, or as an essential element and immediate ground of the final decision (ratio decidendi). Every judgment is a decision not only on the ultimate issue, but by implication on all the antecedent pleas, not only the exception, replication, duplication (for these are exclusively counteractive, not extinctive, pleas, § 115), but also on all facts, e. g. solutio, acceptilatio, novatio, which would be put in issue in English pleading, as necessary to legitimate the final decision, even if, as forming extinctive pleas, they would not be expressed in a Roman formula. Thus, a plaintiff who fails when he sues by real action for a particular thing, or by a personal action for a debt, basing his claim on the presupposition of his succession to a person deceased, cannot afterwards claim the whole succession by hereditatis petitio. Hence we often meet with praescriptio praejudicialis, e. g. Ea res agatur si in ea re praejudicium hereditati non fiat, § 133, or exceptio praejudicialis, e. g. extra quam si in reum capitis praejudicium fiat, Cic. de Inventione, 2, 20; i. e. dilatory pleas whereby a party seeks to postpone a less important issue (causa minor) until a more important issue (causa major) with which it is indissolubly connected, shall have been decided. This praescriptio implies that if the more important issue were decided on

possibly inadequate examination, as incidental or ancillary to the decision of the minor issue, the re-trial of the more important issue would be barred by the exceptio rei judicatae.

Observe that the rule is, a judgment shall not be contradicted by a judgment in another action when the same right is in question, not, when the same title is in question. The latter expression would be sufficient to meet the case of personal actions. Here every different obligation is ground to support a different action, and every different title engenders a different obligation. Thus a plaintiff who fails in an action on tort alleging Dolus is not precluded from a subsequent action on tort alleging Culpa, Dig. 40, 12, 13. But the rule so stated would not adequately meet the case of real actions. Here it is immaterial that the plaintiff alleges a different title. There can be many obligations between the same parties in respect of the same subject; but the same subject only admits of one true dominion, and consequently of only one true title to dominion. Hence the plaintiff in a real action was required to adduce all his fancied titles on pain of being barred by the exception of res judicata, and if, for instance, he claims ownership on the ground of tradition he cannot afterwards claim by another title, e.g. usucapion. A man who fails in a claim as testamentary heir may, however, afterwards claim as heir by descent, Dig. 5, 3, 8: he has as many actions (hereditatis petitio) as he has delations: in fact the legacies and the arbitrary division of the succession between the co-heirs make a testamentary inheritance quite a different right (alia res) from an intestate inheritance. (So Ihering, § 51. But this doctrine seems irreconcilable with Dig. 44, 2, 30, pr. which is quoted by Savigny, § 300, as establishing that a man who fails when he claims as testamentary heir cannot afterwards claim as heir by descent.) The rule, of course, does not apply to a title not in existence at the time of the former action (causa superveniens), and it is defeated if the plaintiff takes the precaution expressly to limit the former action (probably by means of a praescriptio) to the investigation of a specific title, a limitation called causae adjectio. If he was allowed by the praetor to do this and failed in his suit, he could afterwards claim dominion by a different title. Si quis petat fundum suum esse, eo quod Titius eum sibi tradiderit; si postea eum alia ex causa petat, causa adjecta, non debet summoveri exceptione, Dig. 44, 2, 11, 2. 'A plaintiff who loses an action in which he claimed property in land on the ground

of delivery of possession, is not barred by exception from bringing another real action, expressly limited, like the former, to a specific title.'

Extinctive (ipso jure) consumption of a right of action vanished with the formulary system, and in Justinian's time the averment of Res judicata is only found under the form of Exceptio or a Counteractive plea. Indeed, when the judex pedaneus of the republican period ceased to be commissioned to hear and determine causes, one of the conditions of Extinctive litis consumptio (unus judex, § 107), was always of necessity wanting.

But this was not the only change: the consumption of a right of action by the operation of Res in judicium deducta, whether as an extinctive (ipso jure) or a counteractive plea (ope exceptionis); in other words, necessary Novation operated by Litis contestatio, was also abrogated and is not to be found in the statute-book of Justinian. Even the operation of Res judicata, so far as it was governed by the same rules as Res in judicium deducta and merely indicated by its name a later stage of the proceedings (sententia lata) may also be said to have been abolished. The rules, that is to say, which governed the transformed Exceptio rei judicatae, as it prevailed in the time of Justinian, were much more rational and flexible than the hard and fast doctrine of Necessary novation whether by Litis Contestatio or by Sententia lata which prevailed in the time of Statute-process, § 108, and apparently survived to the days of Gaius. As the grounds of the judicial decision (rationes decidendi, denoting here rather the minor premisses or facts established in favour of the plaintiff or defendant, than the major premiss or law relating to those facts) were taken into consideration before the Exceptio rei judicatae was allowed to operate, a plaintiff who lost his cause in consequence of Plus petitio or some dilatory plea or by consumption of process (duration of suit for eighteen months, or termination of praetorship) was no longer held to have eternally forfeited his claim: but suitors were merely restrained, in accordance with the real object of the institution, from harassing their opponents with renewed litigation on the precise questions that had once been adequately decided. The operation of the plea was not less powerful nor less extensive but made more completely conformable to equity. Savigny, §§ 280-301.

DE PERPETUIS ET TEMPORALIBUS ACTIONIBUS ET QUAE AD HEREDES VEL IN HEREDES TRANSEUNT.

§ 110. Quo loco admonendi *sumus*, eas quidem actiones quae ex lege senatusve consultis proficiscuntur, perpetuo solere Praetorem accommodare: eas vero quae ex propria ipsius iurisdictione pendent, plerumque intra annum dare.

§ 110. Actions founded on a law or senatusconsultum are perpetual; those founded on the edict are usually annual.

§ 111. Aliquando tamen *ipse quoque Praetor in actionibus* imita*tur* ius legitimum: quales sunt eae quas *Praetor bonorum possess*oribus ceterisque *qui* heredis loco sunt *accommodat*. *fur*ti quoque manifesti actio, quamvis ex ipsius Praetoris iurisdiction*e pro*ficiscatur, perpetuo datur; et merito, cum pro capitali poena pecuniaria constituta sit.

§ 111. But some of them in which the praetor copies the rule of law are perpetual; for instance, those which are granted to the praetorian successor and the vendee of an insolvent estate. So for theft detected in the commission, the action, though praetorian, is perpetual; and properly so, the pecuniary penalty being a mitigation of capital punishment.

§ 112. Non omnes actiones quae in ali*quem aut ipso iure com*petunt aut a Praetore dantur, etiam in heredem *aeque competunt aut da*ri solent. est enim certissima iuris regula, ex malefici*is* poenales actiones in heredem nec *com*petere *nec Praetorem dare*, velut furti, vi bonorum raptorum, iniuriarum, damni iniuriae: *sed heredibus* actoris huiusmodi actiones comp*etunt* nec denegantur, excepta iniuriarum actione, et si qua alia similis *in*veniatur actio.

§ 112. The actions, whether civil or praetorian, that lie against a man do not always lie against his successor, the rule being absolute that for delict, for instance, theft, rapine, outrage, injury to property, no penal action, civil or praetorian, lies against the successor of the delinquent; but the successor of the plaintiff may bring these actions except in outrage and a few similar cases.

§ 113. Aliquando tamen *etiam* ex contractu actio neque heredi neque in heredem *com*petit. nam adstipulatoris heres non habet actionem, *et* sponsoris e*t* fidepromissoris heres non tenetur.

§ 113. An action upon contract cannot always be brought by the successor of the plaintiff, nor against the successor of the defendant; for the successor of the adstipulator has no action, nor does any lie against the successor of the sponsor or fidepromissor.

§ 110. Having considered what time may elapse between the commencement of an action or joinder in issue (litis contestatio) and its termination (sententia lata), Gaius proceeds to inquire what time may elapse between the nativity of a right of action or the event which marks the first moment of the right of action (actio nata) and the exercise of this right or actual commencement of the action.

Originally all rights of action were unlimited in duration (actio perpetua); afterwards the praetors limited the right of bringing some of the new actions which they introduced to the period of a year from the date of the event on which the action was founded (actio annua). At some subsequent period longi temporis praescriptio was introduced in suits relating to land: if plaintiff and defendant were domiciled in the same province, ten years' possession, accompanied with justus titulus and bona fides on the part of the possessor, deprived the plaintiff of his vindicatio: twenty years' possession was required if plaintiff and defendant were domiciled in different provinces. Indeed in provincial land such possession not only founded a prescription, that is, deprived the owner of his right of action, but operated as a usucapion; that is, transferred the ownership to the possessor. Constantine introduced a thirty years' prescription: that is, ordained that an owner should lose his right of action after thirty years' possession without either justus titulus or bona fides on the part of the possessor. Theodosius II, A.D. 424, extended this thirty years' prescription from real actions, to which it had hitherto been confined, to personal actions.

Justinian made longi temporis praescriptio, that is, possession for ten or twenty years, the universal mode of Usucapion for immovables; and added a second form called longissimi temporis praescriptio, or extraordinary prescription; ordaining that thirty years' possession without justus titulus, but accompanied with bona fides, should transfer ownership to the possessor: and that thirty years' possession accompanied with mala fides should operate not as usucapion but merely as prescription, Cod. 7, 39, 8.

Whether movables were affected by longi temporis praescriptio is controverted, Vangerow, § 315: they seem to be included under longissimi temporis praescriptio.

In the thirteenth century the canon law required as a condition both of usucapion and of prescription, in all cases brought for restitution of possession, continued bona fides (not merely bona fides in the inception, as the civil law required for usucapion) on the part of the possessor. This applied to the defendant in all real actions and in various personal actions, viz. commodati, depositi, locati, pignoraticia, or the action whereby a mortgagor recovers possession of the thing he has mortgaged. Accordingly, by canon law, the debitor rei alienae, as opposed to the debitor rei propriae, had neither usucapion nor prescription in the absence of

continued bona fides. Savigny, § 244. The effect of this seems to be to abolish prescription as opposed to usucapion as far as real action (vindicatio) is concerned; for bona fides coupled with thirty years' possession would make the possessor proprietor.

The civil law, however, in respect of Dominion, recognized prescription as distinct from usucapion. Let us consider what was the case in respect of Servitudes.

There was originally, as we have already stated, usucapion either for all servitudes or at least urban servitudes, until it was abolished by the lex Scribonia. The jurists, however, and praetors recognized an acquisition of servitudes by Diuturnus usus, Longa consuetudo, Longa quasi possessio, of ten years inter praesentes or twenty years inter absentes. This required neither justus titulus nor bona fides (and therefore is never called longi temporis praescriptio) but only freedom from the three vices of possession: it must be nec vi, nec clam, nec precario, Dig. 8, 5, 19, pr. Whether any acquisition of servitudes on less stringent terms, corresponding to longissimi temporis praescriptio in the case of dominion, was ever recognized is not certain: Vangerow, § 351, supposes the contrary.

The extinction of personal and rural servitudes was produced in the times before Justinian by continual non-usus during one year in the case of movables, during two in the case of immovables. Justinian extended the period to ten years inter praesentes and twenty years inter absentes, Cod. 3, 34, 13. No bona fides on the part of serviens is required. If the exercise of the servitude was discontinuous (limited to certain seasons, or alternate months, &c.) before Justinian the period required for extinction was doubled: Justinian required in every case twenty years, Cod. 3, 34, 14, pr. Urban servitudes are extinguished not by mere non-usus on the part of dominans but by additional usucapio libertatis on the part of serviens, i.e. by possession of the servient tenement in such a condition that the servitude could not be exercised. Such is the state of the servient tenement in servitus tigni immittendi when no beam is inserted and the hole where it might be inserted is built up: or when, in the servitus ne luminibus officiatur, dominans has built up his window and in front of it serviens has erected a wall. The same period is required as for extinction by non-usus: the same absence of violence, secrecy, permission (and, by the canon law, the same bona fides) as for the acquisition of other servitudes. Baron, Pandekten, § 171.

It appears then that dominans lost not only his right of action but his servitude (jus) itself by longi temporis consuetudo: and that, properly speaking, Prescription, or Limitation of right of action, as opposed to Usucapio, has no existence in the sphere of Servitude. (I have not been able to find any writer who examines this question.)

In every prescription, whether of longer or shorter duration, two points have to be fixed: the moment at which prescription begins and the moment at which it is terminated. I proceed to the consideration of this problem.

The date of the Nativity of a right of action (actio nata), or the moment from which prescription begins to run, is in Real actions the moment when a Real right is violated; e.g. the moment when the defendant takes unpermitted possession of a thing of which the plaintiff is proprietor; or when a hirer or borrower converts detention into possession by beginning to possess in his own name and not in the name of the proprietor.

In Personal action on delict prescription begins to run from the moment of the delict; for at this moment the sanctioning right of the plaintiff to recover the penalty is complete.

Similarly in Quasi-contracts: prescription of tutelae actio begins to run from the end of the guardianship: that of condictio indebiti from the date of the mistaken payment.

In actions on Contract, according to most writers including Savigny, prescription similarly begins to run from the moment at which the contract is violated, i.e. from the inception of the creditor's sanctioning right. According to Vangerow, the running of prescription does not always wait for the violation of the creditor's primary right, or a breach of the contract by the debtor. If a term for performance is fixed, then indeed prescription will begin to run from the expiration of the term, i.e. from the violation of the plaintiff's primary right, Cod. 7, 39, 7, 4: but whenever no term is prefixed, prescription begins, not, as Savigny holds, from the creditor's demand of performance but, from the completion of the contract; i.e. contemporaneously with the origin of the primary right. It precedes any violation of the plaintiff's right, unless we assume (what is absurd) that the default of instantaneous performance is such a violation.

Savigny would except from the rule those contracts which, like mutuum, depositum, commodatum, precarium, essentially and in

their nature contemplate a certain delay in performance. In such contracts he holds that prescription begins not from the completion of the contract but from the demand of performance.

It seems paradoxical to maintain that for the purposes of prescription the right of action precedes the existence of a wrong: but Vangerow's doctrine is confirmed by the Digest: Est scriptum . . . eum qui rem deposuit, statim posse depositi actione agere: hoc enim ipso dolo facere eum qui suscepit, quod reposcenti rem non reddat, Dig. 16, 3, 22; from which it appears that the action is equivalent to a demand. Similarly we read in the Institutions, 3, 15, 2 [Ex stipulatione pura] confestim peti potest. Indeed it would be strange, as Vangerow observes, if the neglect of a creditor or his successor to demand repayment for 100 years adjourned the inception of prescription for all that period.

It is clear that the Nativity of an action is not to be identified with Mora, but will often be an earlier occurrence. Mora, which in respect of interest and liability for loss is attended with serious consequences to a defendant (whereas praescriptio is adverse to the plaintiff), does not arise before one of two events; either the expiration of the term prefixed for payment, or the debtor's refusal to comply with the creditor's demand. The demand of the creditor is necessary to disprove the presumption that the delay of payment was by his indulgence: no such condition delays the nativity of a right of action.

The other limit of Prescription, or the event by which it is broken (interruptio), is any recognition of a right by the defendant or the institution of a suit by the plaintiff. The institution of a suit was in earlier times identified with Litis contestatio: but in the latest period, as this stage of procedure could be delayed by the arts of the defendant, it was necessary to fix some other point. And accordingly Citation, awarded by the judge in response to the libellus of the plaintiff and served upon the defendant (insinuatio, conventio) by a public officer, was deemed to be the moment at which an action commences, and prescription is interrupted, or usucapion is revocable. Interruptio per conventionem introducta, Cod. 7, 39, 7, 5. Qui obnoxium suum in judicium clamaverit et libellum conventionis ei transmiserit . . . . videri jus suum omne in judicium deduxisse et esse interrupta temporum curricula, Cod. 7, 40, 3.

Vangerow admits that Citation is the event which interrupts

prescription in actiones perpetuae, but holds that Litis contestatio (a later event) produces this effect in actiones temporales. Savigny points out, § 242, that interruption by Litis contestatio in the case of actiones temporales is not mentioned in the Digest because it survived in the time of Justinian, but because the older jurists who speak of interruption were unacquainted with any prescription of actiones perpetuae, these being, in early times, imprescriptible.

We must distinguish between the interruption and the mere suspension, dormancy, or stay, of prescription. When prescription is interrupted (for instance, by acknowledgment of the debt) the already elapsed period of inactivity on the part of the plaintiff is cancelled and the whole prescription must recommence from the date of the interruption. When prescription is suspended, if such suspension takes place after prescription has begun to run, the period which has elapsed is not invalidated but is added to the period which follows the removal of the obstacle which caused the suspension. Suspension, as expressed in the modern maxim: Agere non valenti non currit praescriptio, is produced by some inability of the plaintiff to sue: e. g. by the infancy of the defendant either in perpetual or temporal actions: by the minority of the defendant in perpetual but not in temporal actions, Cod. 2, 41, 5: by the obstacles recognized in the rules of tempus utile, p. 255, and by the beneficium deliberandi accorded to the successor, p. 254. By the ordinance de tigno injuncto in the Twelve Tables the right of the owner of building materials to sue for them was suspended so long as they formed part of a building, Inst. 2, 1, 7, 10.

Exception had sometimes a stronger, sometimes a weaker, operation: the stronger effect is the neutralizing of both civilis and naturalis obligatio. Such is the effect of the exceptio Sc. Velleiani. The weaker operation is a bar to civilis obligatio, but leaves naturalis obligatio unimpeded and is instanced by exceptio Sc. Macedoniani. Naturalis obligatio, as we have already mentioned, besides the negative feature that it is not a ground to support an action has six positive features: it excludes indebiti condictio in the event of payment by mistake, and it is a ground to support compensatio, novatio, pignus, fidejussio, constitutum. Let us examine whether prescription or Exceptio temporalis had the weaker or the stronger operation.

We must distinguish between Real and Personal actions.

The effect of the prescription (tricennalis exceptio) of a real action

(vindicatio) is, that the right of the original owner continues but is not ground to support an action against the mala fide possessor or his successor. If the thing passes into the possession of a stranger, then the original owner can recover it from him by vindicatio: and if it comes by lawful means into the possession of the original owner, the mala fide possessor cannot recover it from him by vindicatio, Cod. 7, 39, 8, 1. In the event of bona fides there could be no question of prescription; because then, as we have seen, the very jus of the original owner would have been extinguished. In real actions, then, prescription has the weaker operation.

The effect of prescription in personal actions is controverted. Savigny holds that the stronger effect is confined to exceptions founded on jus naturale; and that prescription being, as shown by its arbitrary numerical character, an institution of jus civile, can only have the weaker operation, i. e. leaves untouched the obligatio naturalis, § 249. Vangerow, however, seems to show conclusively, § 151, that this doctrine is not tenable. Although the old institution of pendency-limitation or, process-prescription, mentioned by Gaius, 4 § 104, had only the weaker operation (quia naturale debitum manet, Dig. 46, 8, 8, 1), many passages of the Digest show that in temporal actions prescription of right to sue had the stronger operation, excluding fidejussio, Dig. 46, 1, 37, and constitutum, Dig. 13, 5, 18, 1, and admitting condictio indebiti, Dig. 46, 8, 25: and there is no reason why its operation should not be equally strong in perpetual actions. Indeed the very object of prescription, the setting of some limit to the duration of uncertainty, would be defeated if a creditor were allowed to enforce by Compensation a claim that for an indefinite period he had not attempted to enforce by action. Prescription, then, in all personal actions has the stronger operation. (English law seems to differ, at least so far as it recognizes a debt made irrecoverable by the statute of limitations as a sufficient consideration to give legal force to the debtor's promise to pay: for, in the absence of all legal obligation, a mere moral obligation would admittedly not suffice to bind the debtor before the tribunals.)

Has prescription the same effect upon the grounds of defence (Exceptions) that it has upon the grounds of attack (Actions): can there be temporis Replicatio as well as temporis Exceptio? This depends upon the nature of the exception. Exceptions are

either unaccompanied by actions or accompanied. An instance of the former class is the exceptio rei judicatae when judgment in a vindicatio is given in favour of the possessor. This merely denies the right of the plaintiff without affirming the right of the defendant, and therefore cannot be used by the defendant as a ground of action: but it may be employed by the defendant as a means of defence against the plaintiff or his successor after any lapse of years.

An instance of exception accompanied by action is exceptio metus, which belongs to a defendant who may, if he chooses, be a plaintiff in an actio metus.

Savigny holds, § 249, that such exceptions are imprescriptible; but the better opinion seems to be that they have the same duration as the right of action (in the words of the French jurists: Tant dure l'action, tant dure l'exception): for the reason alleged for making exceptions imprescriptible: Is cum quo agitur non habet potestatem quando conveniatur, Dig. 44, 4, 5, 6, the inability of the person armed with the exception to fix when the matter shall be litigated, is inapplicable when the same person is also armed with a right of action. Vangerow, § 151.

§ 111. The rule for the duration of actions is as follows: purely restorative or remedial actions (quae rei persecutionem habent) i. e. actions where there is neither gain for the plaintiff nor loss for the defendant, but the patrimony of each is left at its original level, 4 § 7, are perpetual; that is to say are prescribed in thirty years.

Penal actions (poenae persecutoriae), both those where there is no gain to the plaintiff but possibly a loss to the defendant (indemnificatory or unilaterally penal actions), as well as those where if judgment passes for the plaintiff there is enrichment for the plaintiff and impoverishment for the defendant (bilaterally penal actions) are annual.

Thus the actio doli mali, if brought for complete indemnification, was annual: but if the damages were limited to the amount gained by the defendant, in which case the action was rei persecutoria, it was perpetual, Dig. 4, 3, 28.

When a right of action was limited to a year, this was an annus utilis, that is, a year of dies utiles, of days open to jurisdiction, and on which the plaintiff was not hindered by any insurmountable obstacle, such as absence of plaintiff or defendant, illness of plaintiff and inability to appoint a procurator, Dig. 44, 3, 1. An

annus utilis, though nominally a year, might really be a much longer period. Where a right of action lasted beyond a year, every day was counted (tempus continuum), 2 § 173. From the indefinite duration of annus utilis it is clear that Tribonian's suggestion, Inst. 4, 12, pr., of a connection between the annus of prescription and the annus of the praetorship is purely fanciful.

§ 112. The transmission of an action to the successors of the parties is either active transmission, i. e. transmission to the successor of the plaintiff, or passive transmission, i. e. transmission to the successor of the defendant.

The general rule relating to transmission is, that all actions are transmissible, both actively, that is, to the heirs of the plaintiff, and passively, that is, to the heirs of the defendant.

The exceptions are that (1) as to active transmission Vindictive actions (of which the type is actio injuriarum), i. e. actions brought to avenge wrong to the feelings rather than to repair wrong to the property, are not transmitted to the heirs of the plaintiff; and that (2) as to passive transmission, penal actions, whether bilaterally or unilaterally penal (the latter sometimes called rei persecutoriae ex delicto) are only transmitted against the heirs of the defendant so far as the inheritance has been enriched by his wrong.

Condictio furtiva lies against the heres of the defendant for the whole amount (in solidum): because, although this action is occasioned by delict, it is not deemed to be delictual or penal, but purely restorative (rei persecutoria).

Penal actions, bilateral and unilateral, when once brought, that is, when they have once reached the stage of litis contestatio, become capable of both active and passive transmission: Poenales autem actiones, si ab ipsis principalibus personis fuerint contestatae, et heredibus dantur et contra heredes transeunt, Inst. 4, 12, 1.

Under Justinian, when the Adstipulator, Sponsor, and Fidepromissor had disappeared, all actions founded on contract were passively transmissible in solidum against the heirs of the defendant; and it was apparently a mere inadvertence of Tribonian to repeat, Inst. 4, 12, 1, the words of Gaius, § 113, which contemplate the possibility that an action founded on contract should be incapable of passive transmission.

English law is more favourable than Roman law to the plaintiff in actions ex delicto in respect of the passive transmission of the remedy.

The executors of a testator and administrators of an intestate have the same remedy for injury to the personal property of the deceased as he would have had in his lifetime.

For an injury committed against his real property within six months of his death, they may bring an action within one year after his death. And for an injury to either real or personal property committed within six months before the death of the wrong-doer, an action may be brought against his executors or administrators within six months after they have taken on themselves administration.

SI REUS ANTE REM IUDICATAM SATISFACIAT ACTORI.

§ 114. Superest ut *dis*piciamus, si ante rem iudicatam is cum quo agitur post acceptum iudicium satisfaciat actori, quid officio iudicis conveniat: utrum absolvere, an ideo potius damnare, quia iudicii accipiendi tempore in ea causa fuit, ut damnari debeat. nostri praeceptores absolvere eum debere existimant: nec interess*e* cuius generis *fue*rit iudicium. et hoc est quod volgo dicitur Sabino et Cassio placere omnia iudicia esse absolutoria. *De bonae fidei* iud*iciis autem* idem sentiunt *diversae scholae auctores*, q*uod* in *his quidem* iudiciis liberum est officium iudicis. tantumdem *etiam de in* rem actionibus putant . . . . . . [*desunt* 17 *lin.*]

§ 114. We next inquire whether, if the defendant before judgment is pronounced, but after the formula is delivered, satisfies the plaintiff, the judex has power to absolve him, or must condemn him, because he was liable to condemnation when the formula was delivered. The authorities of my school hold that he should be absolved in every kind of action; and hence the saying that Sabinus and Cassius consider all actions to involve the power of absolution. The other school agree in respect of bona fide actions, where the judex has more discretion, and of real actions . . .

§ 114. Respecting the power of absolution, Justinian confirmed the opinion of the Sabinians, Inst. 4, 12, 2.

The principle, Omnia judicia esse absolutoria indicates an exception to the effects of Litis contestatio. The motive of the effects ascribed to Litis contestatio is in general to avert from the plaintiff the injurious consequences of the protracted duration of a trial. Accordingly if judgment passed in his favour he was put into the position he would have occupied if judgment had immediately followed on litis contestatio. If this rule had been universal no event supervening on litis contestatio could have extinguished the plaintiff's right to have judgment in his favour: but this in some cases

would have been unjust to the defendant, as was admitted by all jurists in the case of personal actions ex fide bona.

In personal actions stricti juris it was at first held that what would have been an adequate ground for the extinction of the plaintiff's claim if it had happened before litis contestatio, e. g. the purely casual destruction of the subject of litigation, was ineffectual to save the defendant from condemnation if it happened after litis contestatio. Finally, however, the doctrine prevailed that, in the absence of Mora, such an event was effectual for the absolution of the defendant, even when it occurred after litis contestatio. See p. 449.

So in real actions, the purely casual destruction of an object in the hands of a bona fide possessor, even when it happened after joinder in issue, produced the absolution of the defendant, on the ground that impossibilium non est obligatio. It is to be observed, however, that the grounds effectual for the absolution of the defendant in a real action are limited to those which destroy the Obligation engendered by litis contestatio. The defendant, that is to say, is subject to condemnation in spite of usucapion of property completed after litis contestatio, in spite of extinction of servitude by non-usus completed after the same date, in spite similarly of casual destruction of the subject in the hands of mala fide possessor or after mora, and in spite of destruction by the culpa of bona fide possessor.

Subject to this limitation, the rule was universal: omnia judicia esse absolutoria: i. e. all classes of action, real as well as personal, stricti juris as well as bona fide, whatever the original right of the plaintiff, *may* terminate by a judgment in favour of the defendant in consequence of some event (casual destruction of the subject, voluntary restitution by the defendant, &c.) subsequent to litis contestatio. Vangerow, § 160. Compare what has been stated respecting actiones Arbitrariae. p. 534.

DE EXCEPTIONIBUS.

§ 115. Sequitur ut de exceptionibus dispiciamus.

§ 116. Com*p*aratae sunt autem exceptiones defendendorum eorum gratia cum quibus agitur: saepe enim accidit, u*t* quis iure civili teneatur, sed iniquum sit eum iu-

§ 115. We have next to examine the nature of Exceptions.

§ 116. Exceptions are intended for the protection of the defendant who often is under a liability, say, by the civil law when justice forbids his condemnation. If, for instance,

dicio condemnari. velut *si* stipulatus sim a te pecuniam tamquam credendi causa numeraturus, nec numeraverim. nam eam pecuniam a te peti posse certum est; dare enim te oportet, cum ex stipulatu teneris: sed quia iniquum est te eo nomine condemnari, placet per exceptionem doli mali te defendi debere. item si pactus fuero tecum, ne id quod mihi debeas a te petam, nihilominus id ipsum a te petere possum DARE MIHI OPORTERE, quia obligatio pacto convento non tollitur: sed placet debere me petentem per exceptionem pacti conventi repelli.

I have made you solemnly promise to pay me a sum of money, as a preliminary to my advancing you the money, and then never advanced it; I can sue you for the money, for you are bound by the promise, but it would be iniquitous that you should be compelled to fulfil such a promise, and therefore you are permitted to impeach my claim by the exception of Fraud. Or if I agreed not to demand a debt, my right to sue the debtor continues unimpaired, because formless agreement cannot extinguish civil obligations, but my action would be defeated by an exception alleging the agreement.

§ 117. In his quoque actionibus quae *non* in personam sunt exceptiones locum habent. velut si metu me coegeris aut dolo induxeris, ut tibi rem aliquam mancipio dem; na*m* si eam rem a me petas, datur mihi exceptio per quam, si metus causa te fecisse vel dolo malo arguero, repelleris. item si fundum litigiosum sciens a non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omnimodo summoveris.

§ 117. Real actions also admit of exceptions; for instance, if by threats of violence or by fraud you drove or seduced me to grant a thing to you by mancipation; if you sue me for it, I am allowed to plead intimidation or fraud, and if I prove it, defeat your claim; or if you knew an estate was a subject of litigation, and bought it of a person not in possession, when you claim it of a person in possession you are defeated by an exception.

§ 118. Exceptiones autem alias in edicto Praetor habet propositas, alias causa cognita accommodat. quae omnes vel ex legibus vel ex his quae legis vicem optinent substantiam capiunt, vel ex iurisdictione Praetoris proditae sunt.

§ 118. Exceptions are either provided by the edict, or, on cause shown, are granted by the praetor, and are either founded on law or something equivalent to law, or on the praetor's judicature.

§ 119. Omnes autem exceptiones in contrarium concipiuntur, qu*am* adfirmat is cum quo agitur. nam si verbi gratia re*us* dolo malo aliquid actorem facere dicat, qui forte pecuniam petit quam non numeravit, sic exceptio concipitur: SI IN EA RE NIHIL DOLO MALO AULI AGERII FACTUM SIT NEQUE FIAT. item si dicatu*r* contra pactionem pecunia peti, ita concipitur exceptio: SI INTER AULUM AGERIUM ET NUME-

§ 119. Exceptions take the form of a supposition opposite to the allegation of the defendant; if, for example, the defendant imputes fraud to the plaintiff in that he sues for money which he never advanced, the exception is thus expressed: 'If in that matter there was and is no fraud of Aulus Agerius.' Again, if he allege an agreement not to claim the money, the exception is thus formulated: 'If Aulus Agerius

RIUM NEGIDIUM NON CONVENIT NE EA PECUNIA PETERETUR. et denique in ceteris causis similiter concipi solet. ideo scilicet, quia omnis exceptio obicitur quidem a reo, sed ita formulae inseritur, ut condicionalem faciat condemnationem, id est ne aliter iude*x* eum cum quo agitur condemnet, quam si nihil in ea re *qua* de agitur dolo actoris factùm sit; item ne aliter iudex eum condemnet, quam si nullum pactum convent*um de* non petenda pecunia factum erit.

and Numerius Negidius did not agree that the money should not be demanded;' and so in other cases. For every exception is alleged by the defendant but is inserted in the formula as a (second) condition of the condemnation: that is, the judex is instructed not to condemn the defendant unless (firstly, the existence of the plaintiff's right is proved, and unless, secondly, no countervailing right of the defendant is proved: e. g.) there is no fraud to vitiate the title of the plaintiff, or there was no agreement whereby his claim was informally released.

§ 120. Dicuntur autem exceptiones aut peremptoriae aut dilatoriae.

§ 120. Exceptions are either peremptory or dilatory.

§ 121. Peremptoriae sunt quae perpetuo valent, nec evitari possunt, velut quod metus causa, aut dolo malo, aut quod contra legem senatusve consult*um* factum est, aut quod res iudicata est vel in iudicium deducta est, item pacti conventi quo pactum est ne omnino pecunia peteretur.

§ 121. Peremptory exceptions are obstructions of unlimited duration and insurmountable, as the plea of intimidation, fraud, contravention of law or senatusconsultum, previous decision or litigation, or formless agreement never to sue.

§ 122. Dilatoriae sunt exceptiones quae ad tempus nocent, veluti illius pacti conventi quod factum est verbi gratia ne intra quinquennium peteretur: finito enim eo tempore non habet locum exceptio. cui similis exceptio est litis dividuae et rei residuae. nam si quis partem rei petierit et intra eiusdem praeturam reliquam partem petat, hac exceptione summovetur, quae appellatur litis dividuae. item si is qui cum eodem plures lites habebat, de quibusdam egerit, de quibusdam distulerit, ut ad alios iudices eant, si intra eiusdem praeturam de his quae ita distulerit agat, per hanc exceptionem quae appellatur rei residuae summovetur.

§ 122. Dilatory exceptions are merely temporary obstructions, such as an agreement that a debt shall not be sued for within five years, for in five years the exception ceases to be pleadable. There are similar exceptions against division or separation of actions. After suing for part of a debt if a man sue for the remainder in the same praetorship, he is barred by the exception against division of actions. Or, when a man who has several claims against the same defendant brings some actions and postpones others in order to come before a new panel of judices, if within the same praetorship he bring any of the postponed actions, he is met by the exception against separation of actions.

§ 123. Observandum est autem ei cui dilatoria obicitur exceptio, ut differat actionem: alioquin si obiecta exceptione egerit, rem per-

§ 123. A plaintiff liable to a dilatory exception should be careful to postpone his action, for the exception once pleaded is fatal; and

dit. nec enim post illud tempus quo integra re evitare poterat, adhuc ei potestas agendi superest, re in iudicium deducta et per exceptionem perempta.

although, if the matter had never been mooted, time would have removed the obstacle, yet it will not now, as his right has been litigated and extinguished.

§ 124. Non solum autem ex tempore, sed etiam ex persona dilatoriae exceptiones intelleguntur, quales sunt cognitoriae; velut si is qui per edictum cognitorem dare non potest per cognitorem agat, vel dandi quidem cognitoris ius habeat, sed eum det cui non licet cognituram suscipere. nam si obiciatur exceptio cognitoria, si ipse talis erit, ut ei non liceat cognitorem dare, ipse agere potest: si vero cognitori non liceat cognituram suscipere, per alium cognitorem aut per semet ipsum liberam habet agendi potestatem, et *potest* tam hoc quam illo modo evitare exceptionem. quod si dissimulaverit *ea*m et per cognitorem *egerit*, *rem perdit.*

§ 124. Irrespective of time, personal incapacities produce dilatory exceptions, such as those which relate to the office of cognitor, for some persons are disabled by the edict from appointing a cognitor, and others are disabled from discharging the office of cognitor. A principal disabled from appointing a cognitor can sue in his own name, and if one person is disabled from acting as cognitor, the principal can employ another, or sue in his own name, and in either way avoid the exception; but if he disregard the incapacity and sue by cognitor, he loses his action and has consumed his remedy.

§ 125. Se*d* peremptoria quidem exceptione cum *reus per errorem* non fuit usus, in integrum restitu*itur servan*dae exceptionis gratia: dilatoria vero si non *fuit* us*us*, an in integrum restitu*a*tur, quaeritur.

§ 125. If a peremptory exception be inadvertently omitted, the defendant is relieved by Restitution, and allowed to amend his defence: whether the same is true of a dilatory exception, is a matter of controversy.

DE REPLICATIONIBUS.

§ 126. Interdum evenit, ut exceptio quae prima facie iusta videatur, inique noceat actori. Quod cum accidat, alia adiectione opus est adiuvandi actoris gratia: quae adiectio replicatio vocatur, quia per eam replicatur atque resolvitur *vis* exceptionis. nam si verbi gratia pactus sim tecum, ne pecuniam quam mihi debes a te peterem, deinde postea in contrarium pacti sumus, id est ut petere mihi liceat, et si agam tecum, excipias tu, ut ita demum mihi condemneris, si non convenerit ne eam pecuniam peterem, nocet mihi exceptio pacti con-

§ 126. Sometimes an exception, which on the face seems just to the defendant, is unjust to the plaintiff, and then, to protect the plaintiff, the praetor adds to the instructions a clause called Replicatio, because it parries and counteracts the exception. If, for instance, after we agreed that I should not sue you for a debt, we agreed that I might sue; if, when I sue, you plead the agreement that I should not sue, you bar my claim, for your allegation is true; but, as it would be unjust that I should be prevented from recovering, I am allowed to

venti; namque nihilominus hoc verum manet, etiam si postea in contrarium pacti simus. sed quia iniquum est me excludi exceptione, replicatio mihi datur ex posteriore pacto *hoc* modo: SI NON POSTEA CONVENERIT UT EAM PECUNIAM PETERE LICERET. item si argentarius pretium rei quae in auctionem venierit persequatur, obicitur ei exceptio, ut ita demum emptor damnetur, si ei res quam emerit tradita *esset: quae est* iusta exceptio. sed si in auctione praedictum est, ne ante emptori traderetur res quam si pretium solverit, replicatione tali argentarius adiuvatur: AUT SI PRAEDICTUM EST NE ALITER EMPTORI RES TRADERETUR QUAM SI PRETIUM EMPTOR SOLVERIT.

reply by pleading the subsequent agreement, thus: 'If there was no subsequent agreement that I might sue.' So if a banker sue for the price of goods sold by auction, he may be met by the plea that they were never delivered, and this is a valid exception. But if it was a condition of the sale, that the goods should not be delivered to the purchaser before payment of the purchase-money, the banker is permitted to insert the Replicatio: 'or if it was a condition of the sale that the goods should not be delivered till the price was paid.'

§ 127. Interdum autem evenit, ut rursus replicatio quae prima facie iusta sit, inique reo noceat. quod cum accidat, adiectione opus est adiuvandi rei gratia, quae duplicatio vocatur.

§ 127. Sometimes a Replicatio, though just on the face, is unjust to the defendant; and then, to protect the defendant, the praetor adds a clause called Duplicatio (Rejoinder).

§ 128. Et si rursus ea prima facie iusta videatur, sed propter aliquam causam inique actori noceat, rursus *ea* adiectione opus est qua actor adiuvetur, quae dicitur triplicatio.

§ 128. Again, if this, though just in appearance, is unjust to the plaintiff, he is protected by another clause called Triplicatio (Surrejoinder).

§ 129. Quarum omnium adiectionum usum interdum etiam ulterius quam diximus varietas negotiorum introduxit.

§ 129. And sometimes further additions are required by the multiplicity of circumstances by which dispositions may be successively or contemporaneously affected (Rebutter and Surrebutter).

DE PRAESCRIPTIONIBUS.

§ 130. Videamus etiam de praescriptionibus quae receptae sunt pro actore.

§ 130. We next proceed to notice the Praescriptio, a clause designed for the protection of the plaintiff.

§ 131. Saepe enim ex una eademque obligatione aliquid iam praestari oportet, aliquid in futura praestatione est. velut cum in singulos annos vel menses certam pecuniam stipulati fuerimus: nam finitis quibusdam annis aut mensibus, huius quidem temporis pecuniam praestari

§ 131. One and the same obligation may entitle us to receive payment of one sum at present and another sum in future. When an annual or monthly payment of a certain sum is stipulated, on the expiration of a year or month we are entitled to present payment for

oportet, futurorum autem annorum sane quidem obligatio contracta intellegitur, praestatio vero adhuc nulla est. si ergo velimus id quidem quod praestari oportet petere et in iudicium deducere, futuram vero obligationis praestationem in incerto relinquere, necesse est ut cum hac praescriptione agamus: EA RES AGATUR CUIUS REI DIES FUIT. alioquin si sine hac praescriptione egerimus, ea scilicet formula qua incertum petimus, *cuius* int*en*tio his verbis concepta est: QUIDQUID PARET *NUMERIUM NEGIDIUM AULO AGERIO* DARE FACERE OPORTERE, totam obligationem, id est e*tiam futura*m in hoc iudicium *deducimus*, et quantumvis *in obligatio*ne *fuerit*, t*amen id* sol*um consequimur*, *quod litis contestatae tempore* pr*aestari oportet*, *id*eoq*ue* rem*ovemur postea agere volentes*. *it*em si verbi gratia ex empto agamus, *ut* nob*is* fund*us* mancipio detur, debemus *ita praescr*ibere: EA RES AGATUR DE FUNDO MANCIP*AN*DO: *ut* postea, si ve*li*m*us* vacuam possessionem nobis trad*i*, *de* trad*enda ea* vel *ex stipulatu* vel *ex* emp*to agere possimus*. n*am si non* p*rae*s*crib*imus, totius illius iuris obligatio ill*a* in*cer*ta actione: QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET, *per* l*itis contestati*on*em* consumit*ur*, ut postea nobis agere volen*tibus de* vacua possessione tradenda nulla supersit actio.

the term expired, and to future payment for the future terms. If, then, we intend to claim and sue for the sum at present due, without bringing the future payments into litigation, we must employ the Praescriptio: 'Let the trial relate exclusively to the right of present payment.' Otherwise, if we sue without this Praescriptio, the indefinite Intentio, 'Whatever it be proved that Numerius Negidius ought to convey to or perform for Aulus Agerius,' brings our whole right to future as well as to present payment before the judex, and, whatever payment may be due in future, we only recover what is due at the commencement of the suit, and are barred from any subsequent action. So if we sue upon a purchase for the conveyance of land by mancipation, we must prefix the Praescriptio: 'Let the trial relate exclusively to the mancipation of the land,' in order that subsequently, when vacant possession is to be delivered, we may be able to sue on stipulation or purchase for delivery of possession; as, without this Praescriptio, all our right under that title is included in the uncertain Intentio, 'Whatever on that ground Numerius Negidius ought to convey to or perform for Aulus Agerius,' and is exhausted by the commencement of the first action; so that afterwards, when we want to sue for the delivery of vacant possession, we have no right of action.

§ 132. Praescr*iptiones autem* appellatas esse ab eo, *quod a*nte formulas praescrib*untur*, plus quam manifestum est.

§ 132. The Praescriptio is named from preceding the formula, as hardly needs to be stated.

§ 133. Sed *h*is quidem temporibus, sicut supra quoque *in*dic*avim*us, omnes praescriptiones ab actore proficiscuntur. olim aut*em* quaedam et pro reo opponebantur. qualis illa er*a*t praescriptio: EA RES AGATUR,

§ 133. At present, as I observed, all praescriptions are inserted by the plaintiff; formerly some used to be employed by the defendant, for instance, the Praescriptio: 'Let this question be tried if it does not

SI IN *EA RE* PRAEIUDICIUM HEREDITATI NON FIAT: q*u*ae nunc in speciem exceptionis deducta est, et locum habet cum petitor hereditatis alio *genere* iudicii praeiudicium *hereditat*i faciat, velut cum *res singulas petat; esset* enim iniquum . . . [*desunt* 24 *lin.*]

prejudice the question of succession;' which clause is now transformed into an exceptio, and is employed when the claimant of a succession brings another action which prejudges the right of succession; as, for instance, if he sues for a part of the heritage; for it would be unjust [to make the decision of the major issue a mere corollary from the decision of the minor]. . .

§ 134. . . *inten*tione formulae de*terminatur* i*s* cui dar*i* oportet; et sane domino dare oportet quod servus stipulatur. at in praescriptione de pacto quaeritur, quod secundum naturalem significationem verum esse debet.

§ 134. . . . the Intentio names the person invested with the right, that is, the master of the slave who stipulated; while the Praescriptio inquires who, according to the true meaning of the contract, is to exercise the power.

§ 135. Quae*cum*que autem diximus de servis, eadem de ceteris quoque personis quae nostro iuri subiectae sunt dicta intellegemus.

§ 135. What has been said of slaves applies to all persons subject to a superior.

§ 136. Item admonendi sumus, si cum ipso agamus qui incertum p*r*omiserit, ita nobis formulam esse propositam, ut praescriptio inserta sit formula*e* loco demonstrationis, hoc modo: IUDEX ESTO. QUOD AULUS AGERIUS DE NUMERIO NEGIDIO INCERT*UM* STIPULATUS EST, MODO CUIUS REI DIES FUIT, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO *AGERIO* DARE FACERE OPORTET et reliqua.

§ 136. We must further remark, that when the principal promisor of an uncertain sum is sued, the formula contains a Praescriptio in place of a Demonstratio, thus: 'Let C D be judex. Whereas Aulus Agerius stipulated an uncertain sum from Numerius Negidius, whatever IN EXCLUSIVE RESPECT OF THE SUM DUE AT PRESENT on that ground Numerius Negidius ought to convey to or perform for Aulus Agerius,' &c.

§ 137. Si cum sponsore aut fideiussore agatur, praescribi solet in persona quidem sponsoris hoc modo: EA RES AG*A*TUR, QUOD AULUS AGERIUS DE LUCIO TIT*I*O INCERTUM STIPULATUS *EST*, QUO NOMINE NUMERIUS NEGIDIUS SPONSOR EST, CUIUS REI DIES FUIT; in persona vero fideiussoris: EA RES AGATUR, QUOD NUMERIUS NEGIDIUS PRO LUCIO TITIO INCERTUM FIDE SUA ESSE IUSSIT, CUIUS RE*I* D*I*ES FUIT; deinde formula subi*c*itur.

§ 137. When a sponsor or fidejussor is sued, in the case of the sponsor the Praescriptio is as follows: 'LET THE TRIAL on the Stipulation by Aulus Agerius that an uncertain sum should be paid by Lucius Titius, of which stipulation Numerius Negidius was sponsor, BE CONFINED TO THE PAYMENT DUE AT PRESENT;' in the case of a fidejussor: 'LET THE ACTION on the guaranty of Numerius Negidius that an uncertain sum should be paid by Lucius Titius, BE CONFINED

TO THE PAYMENT DUE AT PRESENT;' and then follows the rest of the formula.

An explanation of the nature of Exceptions requires to be based on a review of the general incidents of litigation.

In every action there is some contention, allegation, or averment of a plaintiff which is met or encountered by some contention, allegation, or averment of a defendant.

The contention of the plaintiff (intentio) is the assertion of some right of the plaintiff: e. g. in a real action, the assertion of dominion (si paret illam rem Auli Agerii esse): in a personal action, the assertion of an obligation (si paret Numerium Negidium Aulo Agerio illam rem dare facere oportere). In an action with a formula in factum concepta there is an implicit or indirect assertion of a right, although explicitly and directly the intentio only asserts the fact which forms the title on which such right is founded. In the wording of the formula the right of the plaintiff appears as an hypothesis; because the formula or instruction to the judex is a hypothetical command, expressed in a sentence of which the intentio forms the antecedent or protasis, and the condemnatio the consequent or apodosis.

The contention of the defendant is either

(A) a NEGATION of the alleged right of the plaintiff, or

(B) an affirmation of a COLLIDING, countervailing right of the defendant whereby the alleged right of the plaintiff is counterpoised and counteracted.

The denial of the plaintiff's right again admits of division:

1. It is either a simple and absolute negation of the plaintiff's right: an assertion of its non-existence even in the past: an affirmation of its original nullity; or

2. A qualified or relative negation. Admitting or assuming that it once existed, it is a negation of its present existence: an affirmation of its subsequent destruction, nullification, or avoidance.

Accordingly a defendant had three lines of defence:

I. The assertion of the original NULLITY of the plaintiff's right.

This might be either a denial (traverse) of the fact, whether a disposition or a trespass, on which the plaintiff's right was alleged to be founded (general issue of English law).

Or the denial of the law by which such a right was said to be

annexed to such a fact (demurrer of English law). The question whether in the formulary system a pure issue of law was decided by the praetor in jure (denegatio actionis, when the demurrer was sustained; datio actionis, when it was overruled) without reference to a judex, is immaterial to our present purpose, which is merely an exhaustive view of the various modes of defence open to a defendant.

Or it might be an admission of the fact alleged with an allegation of a further fact whereby the efficacy of the admitted fact to found a right was avoided. E. g. the averment of the infancy or lunacy of a party to a disposition (confession and avoidance of English law, producing a plea in justification).

II. The averment of a subsequent nullification or EXTINCTION of the plaintiff's right, admitted to have previously existed (confession and avoidance, i. e. confession not only of a fact, as above, but of a right, with an averment of its subsequent abolition, producing a plea in discharge) e. g. the averment of solutio, acceptilatio, novatio.

III. The objection of a colliding right of the defendant, whereby the right of the plaintiff is not avoided or extinguished but counterworked or restrained from operation: e. g. resistance to an alleged right of a father-in-law by putting forward a counter right of a husband: or arrest of the exercise of the father's rights by confronting them with those of the mother (confession of a fact or right and, not avoidance but, COUNTERACTION). This third mode of defence is called Exceptio. Accordingly exceptio may be rendered a Counteractive or obstructive, as opposed to a Negative or destructive, plea.

The allegation of an exceptio does not preclude the defendant from contesting the intentio: Non utique existimatur confiteri de intentione adversarius, quocum agitur, qui exceptione utitur, Dig. 43, 1, 9, and the intentio must be proved by the plaintiff before the defendant is called upon to prove the exceptio, Cod. 8, 36, 9: so that, instead of *confession* and counteraction, the exception should be described as a supposition or assumption and counteraction, of the plaintiff's right.

1. Examples of the first line of defence are, in a real action, the negation of the traditio on which a plaintiff founds his claim of dominion: in a personal action, negation of the contract or tort on which the plaintiff founds his claim of obligation: in either real or personal action, avoidance of the title alleged by the plaintiff

by allegation of the infancy or lunacy of an alienor or contractor. In hereditatis petitio, the original nullity of a will is pleaded, or the plaintiff's testamentary title is avoided, by averment of the preterition by the testator of a suus heres. A title by contract is avoided by indicating a limitation in respect of time or place or condition or alternative.

In general the grounds of the original nullity of a disposition are either:

(*a*) Want of the conditions necessary to its validity, whether from absence of the personal qualities required in the disposer, or from absence of the intention which is of the essence of a disposition, p. 9, or from absence of the prescribed form in which an intention is required to be declared.

(*b*) Or prohibition of the disposition by positive law.

The antagonism of the legislator to a kind of disposition expressed itself in various ways:

(1) He imposed difficult or inconvenient forms as conditions of its validity. Such a requirement is perhaps what Ulpian, 1, 1, denominates an imperfecta lex: it is exemplified by lex Cincia.

(2) He prohibited a disposition but, instead of declaring it invalid, imposed a penalty on the person by whom it was enforced. This was the method of lex Furia testamentaria, which Ulpian quotes as an example of minus quam perfecta lex.

(3) He prohibited a disposition but only struck it with a partial invalidity: he allowed it to create a valid right, but made such right subject to be deprived of its efficacy by Exceptio. Such an exceptio might be of the weaker class, only barring obligatio civilis, e.g. exceptio Sc. Macedoniani; or of the stronger class, barring both civilis and naturalis obligatio; e.g. exceptio Sc. Velleiani.

(4) He declared the prohibited disposition to be entirely invalid. Such an ordinance is called by Ulpian perfecta lex, and is exemplified in lex Falcidia.

The second of these paths of prohibition ceased to be trodden after an interpretative law of Theodosius II. A law prohibiting municipal senators (curiales) from the management (procuratio) of other persons' estates had been evaded by means of simulated leases (conductio). In consequence of this, Theodosius enacted, in substance, that any prohibitive law, even though it contained no express terms of nullification, should be interpreted to be lex perfecta; and that any simulated dispositions, whereby a

law was attempted to be evaded, should be null and void: Nullum contractum inter eos videri volumus subsecutum qui contrahunt, lege contrahere prohibente... Sed et si quid fuerit subsecutum ex eo vel ob id quod interdicente lege factum est, illud quoque cassum atque inutile esse praecipimus, Cod. 1, 14, 5. This rule will not apply where a statute has expressly provided some other consequence inconsistent with the nullity of the disposition. E.g. the Sc. Macedonianum and Sc. Velleianum render the dispositions which contravene them liable to Exceptio, which is inconsistent with nullification.

2. Examples of the second line of defence are in real action the averment of a subsequent loss of dominion by dereliction or usucapion or alienation, or loss of servitus by non-usus: in hereditatis petitio the avoidance of a valid will by agnatio postumi or by the execution of a later will: in personal action the extinction of a debt by solutio, acceptilatio (formal release), novatio.

In general, the avoidance of a right may either be produced by the very disposition by which the right is originated, viz. by the fulfilment of a resolutive condition which it contains: or by something external, e.g. adjudication, when res judicata operates not as a counteractive but as an extinctive plea, 3 § 180: or by a contrary disposition, e.g. dereliction of property, repudiation of the delatio of legatum or hereditas. In respect of contrary dispositions the general rule obtains that to produce complete invalidity the second disposition must be of similar form to the first; otherwise it only produces incomplete invalidity (exceptio, a counteractive plea): Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur, Dig. 50, 17, 35. Thus, a stipulation is extinguished by a formal release (acceptilatio) but only counteracted by an informal release (pactum de non petendo). However, furtum and injuria were extinguished by nudum pactum, in spite of the dissimilarity of disposition and tort: Quaedam actiones per pactum ipso jure tolluntur, ut injuriarum item furti, Dig. 2, 14, 17, 1: and an informal release followed by an informal revocation (pactum de petendo) is not extinguished but only counteracted, 4 § 126, and Dig. 2, 14, 27, 2.

Let us consider what is the effect when a valid disposition is followed not by a contrary disposition but by some other circumstance of an adverse or inconsistent character. Some jurists laid

down a rule that originally valid dispositions, if followed by a change of circumstances to a state in which such a disposition could not have had a valid inception, are thereby invalidated: Etiam ea quae recte constiterunt, resolvi putant, cum in eum casum reciderunt, a quo non potuissent consistere, Dig. 45, 1, 98, pr. E. g. a marriage was dissolved when one of the parties subsequently lost civitas or libertas. But there are exceptions to the rule: Non est novum ut quae semel utiliter constituta sunt, durent, licet ille casus extiterit, a quo initium capere non potuerunt, Dig. 45, 1, 140, 2. Exstingui obligationem, si in eum casum inciderit, a quo incipere non potest, non . . . in omnibus verum est, Inst. 2, 20, 14. E. g. marriage is not dissolved by the lunacy of one of the parties. Similarly a testament loses its validity when a testator loses civitas or libertas, but not when he becomes a lunatic. It seems then that no general rule can be applied.

A change in the opposite direction, i. e. from circumstances inconsistent, to circumstances consistent, with a disposition, will not, as a general rule, validate the disposition, or produce what is called convalescence: Quod initio vitiosum est, non potest tractu temporis convalescere, Dig. 50, 17, 29. Omnia, quae ex testamento proficiscuntur, ita statum eventus capiunt, si initium quoque sine vitio ceperint, Dig. 50, 17, 201. Regula Catoniana sic definit, quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocunque decesserit, non valere, Dig. 34, 7, 1, pr. But though this applied to legacies, it was not true of institutions of a successor (hereditas), ib. 3, nor of all other dispositions. E. g. when a non-proprietor alienes and subsequently becomes proprietor, the alienation, originally invalid, convalesces, and the purchaser becomes proprietor without a new tradition, Dig. 41, 3, 42.

The removal of an exception, e. g. the voluntary ratification of a contract that was originally vitiated by force or fraud, has practically the same effects as convalescence; but cannot properly be called convalescence, because here the disposition is not originally null and void, but only liable to counteraction. Accordingly in such a case the plaintiff's right would require to be enforced by Replicatio.

3. Exceptions or counteractive pleas, which are the defendant's third means of defence, are either based on the substantive code or on the code of procedure.

(*a*) Examples of exceptions based on the code of procedure are:

exception to the jurisdiction of the court (exceptio fori incompetentis): the objection to a minor issue being tried, while a connected major issue from which it cannot be separated is undecided (exceptio praejudicialis): objection to the appointment of this procurator by the plaintiff (exceptio cognitoria, procuratoria).

(*b*) Examples of exceptions based on the material code are:

In the department of domestic or family law, the exception protecting maternal rights against paternal; i. e. protecting the right of a mother to educate her infant children against her husband who seeks by the interdict de liberis exhibendis or ducendis to enforce the prerogatives of patria potestas, Dig. 43, 30, 3, 5: or protecting marital rights against paternal rights; i. e. protecting the right of the husband to the society of the wife against her father who endeavours by exercising his patria potestas to break up a united household, Dig. 43, 30, 1, 5.

In the department of real law the defendant in a vindicatio by putting forward the exceptio rei venditae et traditae may counterpoise the plaintiff's quiritary right by objecting his own bonitary right, Dig. 21, 3, 1, 2: or he may allege as a counteracting right against the plaintiff's dominion a jus in re, e. g. pignus, Dig. 10, 3, 69, or superficies, Dig. 43, 18, 1, 4. In the actio Publiciana when the purchaser from a non-proprietor endeavours to recover the thing from the true proprietor, the defendant may oppose quiritary to bonitary right by putting forward the exceptio dominii: Si ea res possessoris non sit, Dig. 6, 2, 17, said to be the only exception which in form alleges a right of the defendant, whereas all other exceptions, though they too are all virtually and in effect allegations of a right, in external form are allegations of a fact.

In the department of obligation the defendant's counteractive plea may be an allegation of Force or Error or Formless release. Force and Error, as we have seen, p. 22, do not deprive a disposition of validity, but produce an independent right of redress.

Although Exceptio is always the allegation of a right of the defendant, the right which it alleges, though in other respects of the same nature as the right of a plaintiff, is not always sufficiently energetic to form a ground on which an action might be maintained. We have an instance of this inferior energy in the obligatio naturalis which is generated by nudum pactum, of which we read: Igitur nuda pactio obligationem non parit sed parit exceptionem, Dig. 2, 14, 7, 4.

The collision of the rights of the plaintiff and defendant, as expressed in the intentio and exceptio arises in the majority of cases from the opposition of equity (aequitas) to law, jus strictum, or of jus praetorium to jus civile.

Instances of exceptio founded on jus praetorium are: Exceptio doli, metus, pacti conventi, § 116, hypothecaria, jurisjurandi.

It is, however, erroneous to suppose, as was done in the first edition, that, anomalies disregarded, exceptio is always a plea based on the equitable or praetorian code. This is contrary to the statement of Gaius, § 118, that exceptio is often based on jus civile, and refuted by the following examples of exceptions based on civil law: exceptio dominii, the allegation of civil dominion by the true proprietor who is defendant in an actio publiciana brought by a purchaser from a non-proprietor: exceptio legis Plaetoriae, the allegation of minority. [The lex Plaetoria did not make minors incapable of contracting, but treated their inexperience as a ground for extraordinary relief: otherwise minority, like infancy, would have made a contract null and void, and its averment would not have fallen as an exceptio under the third mode of defence, but, as a negation, under the first, like the averment of infancy]: exceptio legis Cinciae, Frag. Vat. 266, 310, protecting a donor: exceptio legis Juliae, Inst. 4, 14, 4, protecting an insolvent who has made cessio bonorum: exceptio Sc. Macedoniani, protecting filiusfamilias against usurers: exceptio Sc. Velleiani, protecting women from the consequences of intercessio: exceptio Sc. Trebelliani, protecting an heir who is merely a trustee to convey the inheritance to a beneficiary from the pursuit of the creditors, Dig. 15, 2, 1, 8.

Let us examine the meaning of ipsum jus as it occurs in the opposition of actio ipso jure nulla (a right avoided by a destructive plea) and actio ope exceptionis infirmata (a right counteracted by an obstructive plea) or other equivalent expressions.

Ipsum jus sometimes denotes jus civile as opposed to jus praetorium, e. g. in the phrase actiones quae in aliquem aut ipso jure competunt aut a praetore dantur, 4 § 112: but this cannot be its signification here; for the opposition between destruction and obstruction, avoidance and counteraction, is irrespective of the opposition between jus civile and jus praetorium. In a case of avoidance, the plaintiff's claim may be derived not from jus civile but from jus praetorium, e. g. in actio constitutoria, hypothecaria, publiciana: and in a case of counteraction the defendant's plea, as

we have seen, may be derived not from aequitas but from jus civile.

Ipsum jus as contrasted with exceptio denotes the totality of the conditions comprehended in the intentio—the totality of the elements, positive and negative, that constitute the plaintiff's right: in which definition positive elements are the conditions which call a right into existence; negative elements are the absence of any circumstance which could extinguish an existent right or dismiss it into non-existence. Exceptio on the contrary denotes something external to the sphere of the conditions of existence of the plaintiff's right; denotes the existence of an independent adverse right of the defendant. Actio ipso jure nulla will denote a right null and void by the conditions contemplated in the intentio and commonly expressed by the word oportere: actio exceptionis ope infirmata a right defeated by conditions external to the intentio. The words: ipso jure, then, might be paraphrased by the words: si intentionem tantum spectes; or treated as equivalent to: ipsius jure or actoris jure.

The first mode of defence mentioned above denies the existence of one of the positive constituent elements of the plaintiff's right.

The second mode denies the existence of one of the negative constituent elements of the plaintiff's right.

The third mode alleges a second right, vested in a different person, and generated by a title external to the sphere of the conditions which constitute the right of the plaintiff.

In some cases the partition which separates avoidance from counteraction will be extremely thin, and will consist in some arbitrary appointment of positive law. E. g. litis contestatio in judicium legitimum produced avoidance, while litis contestatio in judicium imperio continens only produced counteraction, 3 § 181.

Some extinctions (ipso jure) of a plaintiff's right, where we might have expected only counterpoises (ope exceptionis) or counter rights of a defendant, are to be explained by the fact that there was a period when Roman procedure did not recognize Exceptions—defences by positive averment of counterpoising rights—(nec omnino ita ut nunc usus erat illis temporibus exceptionum, 4 § 108); but required every defence to be in the form of a simple NEGATION—allegation of the original or subsequent NULLITY of the plaintiff's claim. At such a period one of the devices for giving to the defendant the means of defence which he afterwards had in the form of Exceptio was the introduction into the Sub-

stantive code of certain principles respecting the nullification of rights which practically answered the purpose of the Exceptions afterwards introduced into the Adjective code.

An example of such principles is the rule: Impensae necessariae dotem ipso jure minuunt, Dig. 22, 4, 5, 2. A husband when compelled to restore the dower to a divorced wife was fairly entitled to deduct what he had been obliged to spend for its conservation during the subsistence of matrimony. To enable the husband to do this the law EXTINGUISHED the wife's right to an equivalent portion of the dower, and thus protected the husband as effectually as if it had given him an Exceptio asserting an independent right of retention. So the rule: Legata pro rata portione per legem ipso jure minuuntur, Dig. 35, 2, 73, 5, gave to an heir the right of retaining his Falcidian fourth as effectually as he could have done by pleading an Exceptio legis Falcidiae. Again the rule: Ipso jure minutum esse peculium, Dig. 19, 1, 30, pr., gave to an heir, when a slave and his peculium had been bequeathed to a legatee, the right of deducting whatever the slave owed by naturalis obligatio to the testator as effectually as if he had been allowed to plead the debt of the slave in an Exceptio.

It is remarkable that a husband's right to deduct from the dower all *utiles* as opposed to *necessariae* impensae was protected by an Exceptio, Dig. 25, 1, 7, 4. As there seems to be no valid reason for a different treatment of utiles impensae and necessariae impensae, the explanation why the deduction of necessariae was effectuated by Extinction and that of utiles by Exception can only be found in the hypothesis that the former right was recognized by the lawgiver before, the latter after, Exceptions had been introduced into the Adjective code. Ihering, § 52.

These phenomena may incline us to suppose that an enactment of Justinian, which commentators have been much embarrassed to explain, that Compensation should operate by Extinction (ipso jure, Cod. 4, 31, 14), when Exception (here assuredly the natural mode of expressing the true facts of the case) would have answered exactly the same purpose, was a mere anachronism. Justinian intended to assimilate Compensation to the deductions from Dos, Legatum, Peculium: but overlooked the fact that in those cases the method of Extinction was employed by the lawgiver instead of Exception, merely because, when those deductions were first authorized, Exception was unknown to jurisprudence.

Exceptions are capable of various classifications.

As a Negation of the plaintiff's right forms either what we have called the first mode of defence or the second, according as it is founded on a fact contemporaneous or subsequent to the plaintiff's title, so Exceptions rest on facts either contemporaneous or subsequent to those which found the claim of the plaintiff. Examples of contemporaneous exceptions are exceptio doli, exceptio metus, averring that a disposition on which the plaintiff relies was originally vitiated by force or fraud. Examples of subsequent exceptions are the exceptions rei judicatae, longi temporis possessionis, pacti conventi de non petendo. In a Negative averment the subsequent event is ground of avoidance: in an exception the subsequent event is ground of counteraction.

Some exceptions can only be employed by a particular defendant (exceptio personae cohaerens): an example of this is beneficium competentiae, which cannot be pleaded by a debtor's sureties or successors. Others, and the great majority, are available to all defendants without distinction (exceptio rei cohaerens).

Some exceptions are only available against a particular plaintiff (exceptio in personam). E.g. the exceptio doli, Si in ea re nihil dolo malo actoris factum est, only lies against the person by whose fraud a disposition was vitiated, his donees and universal successors; not against a vendee or singular successor. The majority are equally available against all the world (exceptio in rem); e.g. the exceptio metus, which is expressed impersonally, Si in ea re nihil metus causa factum est, and lies against all whose title depends on the vitiated disposition.

The counteraction of the plaintiff's right by exceptio has different degrees of potency. Some exceptions have the stronger effect and deprive the plaintiff's right of all efficacy, barring all obligatio both naturalis and civilis: others have the weaker effect, and though they deprive the plaintiff's right of obligatio civilis, leave it invested with obligatio naturalis. Instances of the weaker effect are the exceptio Sc. Macedoniani, Dig. 14, 6, 10, and beneficii competentiae, Dig. 12, 6, 8, 9. Instances of the stronger effect are exceptio Sc. Velleiani, Dig. 12, 6, 40, pr., exceptio doli, Dig. 12, 6, 65, 1, exceptio metus, Dig. 12, 5, 7, exceptio pacti, Dig. 12, 6, 40, 2. The effect of the exceptions of res judicata and prescription or lapse of time, as we have already stated, is controverted: but they both apparently have the stronger operation, except that in real actions prescription

does not exclude the jus naturale of the proprietor, and prescription of pendency leaves a debtor subject to naturalis obligatio.

In respect of the burden of proof (onus, necessitas probationis) the following are the leading rules:

The party who asserts a right must prove it: Ei incumbit probatio qui dicit non qui negat, Dig. 22, 3, 2. Hence the plaintiff, as a general rule, must prove the intentio: Semper necessitas probandi incumbit illi qui agit, Dig. 22, 3, 21: Actore non probante, qui convenitur, etsi nihil ipse praestat, obtinebit, Cod. 2, 1, 4: and the defendant must prove the exceptio: In exceptionibus dicendum est reum partibus actoris fungi oportere, ipsumque exceptionem velut intentionem implere, Dig. 22, 3, 19, pr.

But, further, in the second line of defence the proof of the matter alleged in avoidance is incumbent on the defendant: ut creditor, qui pecuniam petit numeratam, implere cogitur, ita rursum debitor, qui solutam affirmat, ejus rei probationem praestare debet, Cod. 4, 19, 1. In a passage of the Digest this rule is combined with the preceding: Secundum generalem regulam, quae eos qui opponendas esse exceptiones adfirmant, vel solvisse debita contendunt, haec ostendere exigit, Dig. 22, 3, 25, 2.

Moreover in the first line of defence, when it assumes the form of a confession and avoidance; e.g. an averment of the lunacy of a testator; in other words, when it is contended that a disposition, in consequence of some exceptional circumstance, had not the validity which the law presumes; the proof of this avoiding allegation is on the defendant, Cod. 6, 36, 5. Bethmann-Hollweg, § 109.

In the middle ages the true exceptio or counteractive plea was called exceptio juris: the first line of defence, when it assumed the form of an avoidance, and the second line of defence, whatever its special nature, were called inappropriately exceptio facti. This shows that the true nature of exceptio had been forgotten: the similarity, however, of the three lines of defence in respect of the burden of proof is probably the reason why they were all called exceptio.

The necessity of disclosing by the pleadings whether the defendant relies on the first or second line of defence, e.g. whether he denies that a debt ever existed, or maintains that it was extinguished, in order to save the plaintiff from being taken by surprise (for which disclosure there was no provision in procedure

by formula), is probably the reason why the second line of defence as well as the third is treated as an exceptio in modern Germany.

The distinction between counteractive and destructive pleas does not seem to have had much influence on English pleading. Stephens in his Commentaries, V. 10, admits that all pleas are not necessarily either traverses or pleas in avoidance; and, as an instance of a plea that falls under neither class, mentions pleas by way of estoppel. One species of estoppel, estoppel by record, is the Roman exceptio rei judicatae: so that here we find recognized a third class of plea under which we might have expected that other averments analogous to other Roman exceptions would be ranged. We find, however, the pleas of the statute of limitations (prescription) and of set-off (compensatio) given as instances of pleas in discharge, i. e. of what we have called the second line of defence, or pleas in avoidance. [For the general theory of Exceptio, see Savigny, §§ 202, 203, 226–229.]

I proceed to notice some of the points incidentally mentioned by Gaius.

The denial by a defendant that he had received money from a plaintiff would not, in an actio Mutui, appear on the face of the formula: as a simple Negation of the plaintiff's right, it would fall under the first line of defence. It would only assume the form of Exceptio pecuniae non numeratae, § 116, in an action brought on a Stipulation. Here the promise of the defendant to repay would establish a right of the plaintiff: but the absence of a previous payment by the plaintiff would give the defendant a countervailing right, to be alleged in an exceptio. In this exception the burden of proof was not, as in other cases, on the defendant but on the plaintiff, Cod, 4, 30, 3: but after a certain period, fixed by Marcus Aurelius at five years, reduced by Justinian to two, Cod. 4, 30, 14, the production of the document (cautio) in which the stipulation was recorded was a sufficient proof that the plaintiff had performed this antecedent condition. During these five or two years, accordingly, the effect of formal contracts, whether verbal (verbis) or literal (literis), was virtually suspended in the case of a money loan: for the plaintiff had to prove his execution of the consideration, that is, a formless or real contract (re), and was not entitled to recover on mere proof of formal contract by stipulatio or expensilatio.

§ 117. Intimidation (metus) was ground to support not only an exception, but also an action and an in integrum restitutio. The words of the edict: Quod metus causa gestum erit ratum non habebo, Dig. 4, 2, 1, 'Duress shall be a ground for rescinding any disposition,' are in rem scripta or impersonal: they do not specify the intimidator, but promise a remedy even against innocent persons who may have come into possession of property in consequence of an intimidation. The actio quod metus causa was an actio arbitraria, § 47, and during one year was bilaterally penal and lay for fourfold damages: after that it only lay for simple damages and was purely conservative or restorative. It was a personal action, and therefore in case of the defendant's insolvency was not an adequate remedy, as the plaintiff then would only share the assets with the other creditors of the defendant. To enable the plaintiff to bring a real action it would be necessary for him to obtain from the praetor the extraordinary relief of in integrum restitutio, a rescission of the forced alienation. He then might bring a vindicatio, which would separate his property from the assets of the defendant over which other creditors had a claim, p. 351.

Dolus, like metus, gave rise to an exceptio, § 117, an actio arbitraria and in integrum restitutio. The action quod dolo malo factum est, if brought to recover the whole amount of loss incurred by fraud, being unilaterally penal, or penal in respect of the defendant, originally was prescribed in a year. Constantine, A.D. 319, extended the period of prescription to two calendar years, biennium continuum, Cod. 2, 22, 8. After that period the plaintiff had only a non-penal actio in factum for damages to the amount that the defendant had gained by the fraud.

§ 119. In the exceptio doli the words: Si in ea re nihil dolo malo Auli Agerii factum sit, allege dolus praeteritus, i.e. assert that the right of the plaintiff was vitiated in its origin: the words: neque fiat, allege dolus praesens, i.e. assert that the right of the plaintiff, though originally clear of dolus, is now in collision with a right of the defendant, e.g. compensatio. Dolo facit quicunque id quod quaqua exceptione elidi potest petit: nam etsi inter initia nihil dolo malo fecit, attamen nunc petendo facit dolose, Dig. 44, 4, 2, 5.

Any exception of fraud might be transformed into an exceptio in factum, and vice versa. The exception of fraud, being discredi-

table to the plaintiff, could not be alleged against a parent or patron, but had to be converted into an exception of fact, Dig. 44, 4, 4, 16.

Bona fides implies the absence of dolus: so far then as the exceptio merely empowered the judex to take into consideration equitable grounds of defence, no exceptio doli was necessary in actions ex bona fide, for here the commission of the judex expressly authorized him in the intentio of the formula to decide upon equitable grounds (ex bona fide): Judicium bonae fidei continet in se doli mali exceptionem, Dig. 30, 1, 84, 5: Doli exceptio inest de dote actioni, ut in ceteris bonae fidei judiciis, Dig. 24, 3, 21. This, however, does not apply to the exceptio rei judicatae and others like exceptio cognitoria and litis dividuae, which are founded rather on political than on equitable considerations, and had to be expressed in the formula, if they formed the defence of the defendant, even in actions ex bona fide. So a set-off (compensatio) of an independent debt was required to be announced in an exceptio.

Cicero gives the form of exceptio doli contained in the edictum Asiaticum of Q. Mucius: Extraquam si ita negotium gestum est ut eo stari non oporteat ex fide bona, Ad Att. 6, 1, 'unless the circumstances of the disposition make its enforcement inconsistent with the principles of good faith.' This seems to be impersonally framed, but the formula, as stated, may be incomplete.

The exceptio doli from the comprehensiveness of its meaning, does not sufficiently disclose the line of defence which a defendant intends to pursue: accordingly, in Germany, the fact which constitutes the dolus is always required to be specified.

Property became litigious (res litigiosa, § 117) as soon as it was the subject of litis contestatio. Originally it was only the plaintiff (non-possessor) who was prohibited from alienation. An edict of Augustus prohibited the alienation of litigated Italic land by a non-possessing plaintiff in terms which explain why an exceptio was necessary in order to repel the claims of the alienee. Qui contra edictum divi Augusti rem litigiosam a non possidente comparavit, praeter quam quod emptio nullius momenti est, poenam quinquaginta sestertiorum fisco repraesentare compellitur: sed hoc in provincialibus fundis prava usurpatione obtinuit. Fragmentum de jure fisci. 'If, in contravention of the edict of Augustus, a subject of litigation is purchased of a vendor not in possession,

the sale is void and the purchaser forfeits fifty sestertia to the treasury. The edict is inapplicable to provincial soil.' Italic soil was aliened by mancipatio, 2 § 27; and mancipation of land was perfect without delivery of possession, 1 § 121. The edict only declared the sale (emptio) void, not the mancipatio. To defeat, therefore, the vindicatio of the purchaser, the possessor (defendant in the original suit) required the protection of an exceptio. Alienation by a defendant in possession appears not to have been prohibited, because, the condemnatio in any suit being pecuniaria, it was held that the defendant could not injure the plaintiff by alienation of the specific thing.

At a later period, when execution in a suit consisted in the delivery of the specific thing, alienation by a defendant was recognised as an injury to the plaintiff. Accordingly Justinian's code, 8, 37, 2, not only avoided every alienation by a plaintiff of the dominion or obligation that he claims, but also alienation by a possessing defendant in a vindicatio, Cod. 8, 37, 4, Nov. 112, 1. If the purchaser had notice of the litigiosity, he forfeits the purchase money to the fiscus, and the vendor forfeits an equal sum. If the purchaser was without notice, he recovers his purchase money and one-third additional from the vendor, who further forfeits two-thirds to the treasury. Vangerow, § 160.

Compare the prohibition of Champerty and Maintenance in English law. Champerty is buying or selling a disputed title to land not in possession of the seller. Whether the title of the vendor be bad or good, if the land is held adversely to him, such a sale is void. Choses in possession (movables) and choses in action (obligations) may be sold after the institution of a suit, unless the assignment savour of Maintenance, i. e. be made with the design of fomenting litigation.

§ 120. Justinian, Inst. 4, 13, 8, uses the term temporalis as equivalent to dilatoria, but then an ambiguity arises: for temporalis exceptio sometimes denotes the plea of prescription (longi temporis exceptio), e. g. Cod. 5, 12, 30: and the plea of prescription is perpetua, i. e. non-temporalis.

§ 123. The statement of Gaius, that a dilatory exception, if sustained, was fatal to the claim of the plaintiff, as his right of action was consumed, can scarcely have been true of exceptio fori, and exceptio praejudicialis. When a court is incompetent to try a cause or postpones the trial, the instructions to the judge: Si non paret,

absolve, are inapplicable. The cause is not heard, and the right of action cannot have been consumed when it has never been exercised.

In the legislation of Justinian, no dilatory exception was a bar to a subsequent institution of a suit. Savigny, § 227.

§ 124. The disability of an infamous person (infamis) to create a procurator or to discharge the office of procurator was abolished by Justinian, Inst. 4, 13, 11.

§ 126. The following instances of Replicatio may be found in the Digest. A general agent could not be sued by another agent without express authority. A plaintiff who has such authority will meet the exceptio of the defendant, alleging general agency, by a replicatio alleging special instructions to sue the defendant: Aut si mihi mandatum est ut a te peterem, Dig. 3, 3, 48.

If a woman acting as guarantor in contravention of Sc. Velleianum sell and deliver her land to the creditor, she can recover it back by a real action; and meet the exceptio alleging sale and delivery by a replicatio alleging the contravention of Sc. Velleianum: Aut si ea venditio contra senatusconsultum facta sit, Dig. 16, 1, 32, 2.

Another text observes that an equality of fraud on the part of plaintiff and defendant is more adverse to the plaintiff than to the defendant, because an exceptio of the defendant alleging fraud on the part of the plaintiff is not allowed to be met by a replicatio of the latter alleging fraud on the part of the defendant: Aut si rei quoque in ea re dolo actum sit, Dig. 50, 17, 154.

The Replicatio, then, if we trust these examples, was a proposition beginning with the words Aut si: and, if this was universal, we must suppose that the expression of Gaius, Si non postea convenerit ut eam pecuniam petere liceret, § 126, only gives the substance of the replicatio, not the precise terms in which it was introduced by the praetor into the formula.

Ulpian, Dig. 44, 1, 2, 3, and Julian, Dig. 27, 10, 7, 1, 2, differ from Gaius in the use of the words Duplicatio and Triplicatio. They identify Duplicatio with Replicatio; and consequently use Triplicatio to signify an averment which Gaius would call Duplicatio.

§ 130. The Praescriptio in favour of the plaintiff became obsolete so soon as the old doctrine respecting litis consumptio was abrogated

and superseded by more rational rules respecting the operation of Res judicata, p. 579. In the Digest praescriptio has become a mere synonym of exceptio.

§ 131. In connection with the praescriptio: Ea res agatur cujus rei dies fuit, we may quote an anecdote which Cicero puts into the mouth of Crassus in illustration of the gross ignorance occasionally displayed by the Roman advocate: Quid? his paucis diebus nonne, nobis in tribunali Q. Pompeii praetoris urbani familiaris nostri sedentibus, homo ex numero disertorum postulabat ut illi unde peteretur vetus atque usitata exceptio daretur, CUJUS PECUNIAE DIES FUISSET? quod petitoris causa comparatum esse non intelligebat: ut [ne?] si ille infitiator probasset judici ante petitam esse pecuniam quam esset coepta deberi, petitor rursum quum peteret exceptione excluderetur, QUOD EA RES IN JUDICIUM ANTEA VENISSET, De Oratore, 1, 37. 'A few days ago when I was sitting as assessor of the praetor urbanus, the defendant's advocate pressed the praetor to insert in the formula the old and common exception: IN EXCLUSIVE RESPECT OF THE PAYMENT ALREADY DUE, not knowing that it only protected the plaintiff, saving him, if his demand was proved to be premature, from being barred in a subsequent action by the exception of PREVIOUS LITIGATION.'

When mancipation was the usual mode of transferring property in immovables and was complete without delivery of possession, Ulpian, 19, 6, and when, further, the rules of litis consumptio prevailed, a plaintiff would occasionally need the praescriptio: Ea res agatur de fundo mancipando. At a later period transfer of possession became the only means of transferring property, and the rules of res in judicium deducta (lis contestata), as we have seen, underwent a reform.

Praescriptio, in the legislation of Justinian, is sometimes equivalent to Usucapio. This arose in the following manner. A proprietor's right to recover by vindicatio might at an early period be barred by an averment of adverse possession, during ten years, if the parties were domiciled in the same province, during twenty years, if they were domiciled in different provinces (longi temporis possessio). This exceptio of the defendant appeared in the formula in the shape and under the name of a praescriptio. When, by later legislation, longi temporis possessio accompanied with bona fides became a title whereby property was acquired (usucapio), p. 581, it still retained its original name of praescriptio; though, perhaps, to

avoid confusion, it would have been better to confine this term to possession accompanied with mala fides, i. e. possession that does not operate a transfer of ownership.

The leaf containing from intentione formulae, § 134, to aut pro possessore, § 144, was separated from the rest of the Veronese codex, and seen by Scipio Maffei in 1732. It was afterwards published by Haubold in 1816, the very year in which Niebuhr discovered the rest of the codex.

DE INTERDICTIS.

§ 138. Superest ut de interdictis dispiciamus.

§ 139. Certis igitur ex causis Praetor aut Proconsul principaliter auctoritatem suam finiendis controversiis *inter*ponit. quod tum maxime facit, cum de possessione aut quasi possessione inter aliquos contenditur. et in summa aut iubet aliquid fieri, aut fieri prohibet. formulae autem verborum et conceptiones quibus in ea re utitur interdicta dec*retave* vocantur.

§ 140. *Vocantur* autem decreta cum fieri ali*qu*id iubet, velut cum praecipit, ut aliquid exhibeatur aut restituatur: interdicta vero cum prohibet fieri, velut cum praecipit: ne sine vitio possidenti vis fiat, neve in loco sacro aliquid fiat. unde omnia interdicta aut restitutoria aut exhibitoria aut prohibitoria vocantur.

§ 141. Nec tamen cum quid iusserit fieri aut fieri prohibuerit, statim peractum est negotium, sed ad iudicem recuperatoresve it*ur*, et ibi editis formulis quaeritur, an aliquid adversus Praetoris edictum factum sit, vel an factum non sit quod is fieri iusserit. et modo cum poena agitur, modo sine poena: cum poena, velut cum per sponsionem agitur; sine poena, velut cu*m* arbiter petitur. et quidem ex prohibitoriis

§ 138. The last subject to be examined are interdicts.

§ 139. In certain controversies, chiefly when possession or quasi-possession (possession of a servitude) is in dispute, the praetor or proconsul intervenes in a paramount or sovereign capacity and commands some performance or forbearance; which commands, formulated in solemn terms, are called interdicts or decrees.

§ 140. Decrees, when he commands that something be performed; for instance, when he orders that something be produced, or something be restored: interdicts, when he prohibits some act; as when he forbids the violent disturbance of an unimpeachable possession, or the desecration of consecrated ground. Interdicts, then, are orders either of restitution, or of production, or of abstention.

§ 141. The order of performance or forbearance does not end the proceedings, but a formula is delivered instructing a judex or recuperators to inquire whether anything has been committed contrary to the praetor's prohibition or omitted contrary to his injunction. Their judgment sometimes is penal, sometimes not penal; penal when the procedure is by sponsio, not penal when by de-

interdictis semper per sponsionem agi solet, ex restitutoriis vero vel exhibitoriis modo per sponsionem, modo per formulam agitur quae arbitraria vocatur.

mand of arbitration. Prohibitory interdicts are always preliminary to sponsio; orders of restitution or production sometimes to sponsio, sometimes to arbitration.

§ 142. Principalis igitur divisio in eo est, quod aut prohibitoria sunt interdicta, aut restitutoria, aut exhibitoria.

§ 142. The first division, then, of interdicts is into orders of abstention, of restitution, of production.

§ 143. Sequens in eo est divisio, quod vel adipiscendae possessionis causa comparata sunt, vel retinendae, vel reciperandae.

§ 143. The next is into interdicts for obtaining possession, for retaining possession, for recovering possession.

§ 144. Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, cuius principium est QUORUM BONORUM: eiusque vis et potestas haec est, ut quod quisque ex his bonis quorum possessio alicui data est pro herede aut pro possessore possideret, id ei cui bonorum possessio data est restituatur. pro herede autem possidere videtur tam is qui heres est, quam is qui putat se heredem esse: pro possessore is possidet qui sine causa aliquam rem hereditariam vel etiam totam hereditatem, sciens ad se non pertinere, possidet. ideo autem adipiscendae possessionis vocatur, quia ei tantum utile est qui nunc primum conatur adipisci rei possessionem: itaque si quis adeptus possessionem amiserit, desinit ei id interdictum utile esse.

§ 144. An interdict for obtaining possession is issued for the grantee of possession, beginning: 'Whatever portion of the goods;' and injoining, that whatever portion of the goods, whereof possession has been granted to the claimant, is in the hands of one who holds as successor (civil, praetorian, or fidecommissary) or as mere possessor, such portion shall be delivered to the grantee of possession. He holds as successor who either is successor or thinks himself successor; he holds as mere possessor who relies on no title but holds a portion or the whole of the inheritance, knowing that he is not entitled. It is called an interdict for obtaining possession because it is only available for initiating possession, and is not granted to a person who has already had and lost possession.

§ 145. Bonorum quoque emptori similiter proponitur interdictum, quod quidam possessorium vocant.

§ 145. The execution purchaser in insolvency [purchaser at the sale of the goods of an insolvent debtor] also has an interdict, which some call possessory.

§ 146. Item ei qui publica bona emerit, eiusdem condicionis interdictum proponitur, quod appellatur sectorium, quod sectores vocantur qui publice bona mercantur.

§ 146. The purchaser of the confiscated goods of a criminal has a similar interdict, which is called sectorium, because the purchasers of public property are called sectores.

§ 147. Interdictum quoque quod appellatur Salvianum apiscendae

§ 147. The interdict called Salvianum is an interdict for obtaining

possessionis co*m*paratum est, eoque utitur dominus fundi de rebus coloni quas is pro mercedibus fundi pignori futuras pepigisset.

possession, and is available to the landlord against the detainers of the tenant's property which has been hypothecated as a security for rent.

§ 148. Retinendae possessionis causa solet interdictum reddi, cum ab utr*a*que parte de proprietate alicuius rei controversia est, et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat, cuius rei gratia comparata sunt UTI POSSIDETIS et UTRUBI.

§ 148. Interdicts for retaining possession are granted when two parties claim proprietorship, in order to determine which shall be plaintiff and which defendant, and are called the interdicts: 'Whichever party has possession,' and, 'Whichever party had possession.'

§ 149. Et quidem UTI POSSIDETIS interdictum de fundi vel aedium possessio*ne* redditur, UTRUBI vero de rerum mobilium possessione.

§ 149. The former refers to land and houses, the latter to movables.

§ 150. Et si quidem de fundo vel aedibus interdicitur, eum potiorem esse Praetor iubet qui eo tempore quo interdictum redditur nec vi nec clam nec precario ab adversario possideat; si vero de re mobili, *tunc* eum potiorem esse iubet qui maiore parte eius anni nec vi nec clam nec precario ab adversario possidet: idque satis ipsis verbis interdictorum significatur.

§ 150. When the interdict relates to land or houses, the praetor prefers the party who at the issuing of the interdict has possession unimpeachable in respect of the adversary for violence, clandestinity, or permission. When the interdict relates to a movable, he prefers the party who in respect of the adversary has possessed without violence, clandestinity, or permission, during the greater part of the year. The terms of the interdicts sufficiently show this distinction.

§ 151. *At* in UTRUBI interdicto non sol*um* *s*ua *cui*que possessio prodest, sed etiam alteri*us* quam iustum est ei acc*e*dere, velut eius cui heres extiterit, eiusque a quo emerit vel ex donatione aut do*tis* *d*atione acceperit. itaque si nostrae pos*s*essioni iuncta alterius iusta possessio exsuperat adversarii possessionem, nos eo interdicto vincimus. nullam autem propriam possessionem habenti accessio temporis nec datur nec dari potest; nam ei quod nullum est nihil accedere potest. se*d* *et* si vitiosam habeat possessionem, id est aut vi aut clam aut precario ab adversario adquisitam, *non* d*atur*; *nam ei possessio* sua nihil prodest.

§ 151. In the interdict, 'Whichever party possessed,' possession includes, besides the possession of the litigant, any possession of another person which may justly form an accession, such as that of a person deceased to whom he succeeds, that of a vendor, of a donor, of a settlor of dower; and if my possession added to the just possession of another person exceeds that of the adversary, my claim is preferred; but he who has no possession of his own neither receives nor can receive any accession of another's possession; for what is non-existent is incapable of receiving accession. So a possession impeachable for violence, clandestinity, or permission, cannot

receive an accession, and is of no avail.

§ 152. Annus autem retrorsus numeratur. itaque si tu verbi gratia anni mensibus possederis prioribus v, et ego VII posterioribus, ego potior ero qu*antitat*e mensium possessionis; *nec* tibi in hoc interdicto *prodest*, quod *prior tua eius* an*ni* possessio *est*.

§ 152. The year computed is the year immediately preceding; so that, if you possessed during the first five months, and I during the seven following months, I am preferred, and it avails you nothing that you were the prior possessor.

§ 153. Possidere autem videmur non so*lum si ip*si possideamus, sed etiam si nostro nomine aliquis in possessionem sit, licet i*s* nostro iur*i* subiectus non sit, qualis est colonus et inquilinus. per eos quoque aput quos deposuerimus, aut quibus commodaverimus, aut quibus *gratuit*am habitationem *con*stituerimus, ipsi possidere videmur. et hoc est quod volgo dicitur, retineri possessionem posse per quemlibet qui nostro nomine sit in possessione. quinetiam plerique puta*nt* animo *quoque reti*neri possessionem, quod nostrorum *praeceptorum sententia est. Diversae autem scholae auctoribus contrarium placet, ut* animo solo, qu*amvis* vol*uerimus ad rem reverti, tamen* retinere pos*sessionem non* videamu*r*. apisc*i vero possessionem per* quos pos*simus*, secundo commentario rettulimus; nec ulla dubitatio est, quin animo *possess*ion*em* a*pisci non* pos*simus*.

§ 153. My possession includes, besides my personal possession, the possession of any one who holds in my name, though not subject to my power; for instance, the possession of my tenant or lodger. So also a depositary, borrower for use, usufructuary, or grantee of use or habitation, may be the instrument of my possession, as is expressed by the saying that we retain possession by those who hold in our name. It is generally allowed that intention suffices for the retention of possession, as my school maintains, when a man leaves a thing, for instance, with the intention of returning. The instruments of obtaining possession were mentioned in the second book, and it is agreed on all hands, that for obtaining possession intention does not suffice.

§ 154. Recuperandae possessionis causa solet interdictum dari, si quis vi deiectus sit. nam ei proponitur interdictum cuius principium *est:* UNDE TU ILLUM VI DEIECISTI. per quod is qui deieci*t* cogitur ei restituere rei possessionem, si modo is qui deiectus est nec vi nec *clam* nec precario *possid*et *ab adversario:* quod si aut vi aut clam aut precario possederit, *impun*e d*eicitur*.

§ 154. An interdict for recovering possession is granted to a person dispossessed of an immovable by violence, beginning: 'In the place whence thou hast violently ousted,' which compels the invader to restore possession, if the person ousted possessed without violence, clandestinity, or permission, in respect of the invader. Whereas, if his own possession was violent, clandestine, or permissive, a person may be ousted with impunity.

§ 155. Interdum tamen *etiam* ei *quem* vi d*eiecerim*, quamvis *a* me

§ 155. Sometimes, however, the person violently ousted, though his

aut vi aut clam aut precario possideret, cogar *rei* restituere possessionem, velut si armis eum vi deiecerim: nam Praetor [*desunt* 4 *lin.*]

own possession was violent, clandestine, or permissive, in respect of the adversary, must be reinstated, that is, if he was ousted by force of arms.

§ 156. Tertia divisio interdictorum in hoc *est, quod aut* simplici*a* sunt aut duplicia.

§ 156. A third division of interdicts is into Simple and Double.

§ 157. Simplicia velut in quibus alter actor, alter reus est: qualia sunt omnia restitutoria *aut* exhibitoria. nam actor est qui desiderat aut exhiberi aut restitui, reus is est a quo desideratur ut exhibeat aut restituat.

§ 157. Those are simple wherein one party is plaintiff and the other defendant, as always is the case in orders of restitution or production; for he who demands restitution or production is plaintiff, and he from whom it is demanded is defendant.

§ 158. Prohibitoriorum autem interdictorum alia duplici*a*, alia simplicia sunt.

§ 158. Of prohibitory interdicts, some are simple others double.

§ 159. Simplicia sunt *veluti* quibus prohibet Praetor in loco sacro aut in flumine publico ripave eius aliquid facere *r*eum: nam actor e*st* qui desiderat ne quid fiat, reus is qui aliquid facere conatur.

§ 159. The simple are exemplified by those wherein the praetor commands the defendant to abstain from desecrating consecrated ground, or from obstructing a public river or its banks; for he who demands the forbearance is plaintiff, he who attempts the performance is defendant.

§ 160. Duplicia sunt, velut UTI POSSIDETIS interdictum et UTRUBI. ideo autem duplicia vocantur, quia par utriusque litigatoris in his condicio est, nec quisquam praecipue reus vel actor intellegitur, sed unusquisque tam rei quam actoris partes sustinet: quippe Praetor pari sermone cum utroque loquitur. nam summa conceptio eorum interdictorum haec est: UTI *NUNC* POSSIDETIS, QUOMINUS ITA POSSIDEATIS VI*M* FIERI VETO. item alterius: UTRUBI HIC HOMO DE QUO AGITUR, APUD QUEM MAIORE PARTE HUIUS ANNI FUIT, QUOMINUS IS EUM DUCAT VI*M* FIERI VETO.

§ 160. Of double interdicts we have examples in: 'Whichever party possesses,' and 'Whichever party possessed.' They are denominated double because the footing of both parties is equal, neither being exclusively plaintiff or defendant, but both playing both parts, and both being addressed by the praetor in identical terms. For by the effect of these interdicts whichever party now possesses the land, the other is forbidden to disturb his possession; and whichever party has possessed a slave during the greater part of the year, the other is forbidden to disturb him in the abduction of the slave.

§ 161. Expositis generibus interdictorum sequitur ut de ordine et de exitu eorum dispiciamus; et incipiamus a si*m*plicibus.

§ 161. After classifying interdicts we have next to explain their process and result; and we begin with the simple.

§ 162. *Si* igitur restitutorium vel exhibitorium interdictum redditur,

§ 162. When an order of restitution or production is issued, for

velut ut restituatur ei possessio qui vi deiectus est, aut exhibeatur libertus cui patronus operas indicere vellet, modo sine periculo res ad exitum perducitur, modo cum periculo.

§ 163. Namque si arbitrum postulaverit is cum quo agitur, accipit formulam quae appellatur arbi*tra*ria. nam iud*i*cis arbitrio si quid restitui vel exh*i*beri deb*eat*, i*d* sine *poena* exhibet *vel* restituit, et ita absolvitur: quod si nec restituat neque exhibeat, q*uan*ti ea res est condemnatur. se*d* actor q*uoque* sine poena experitur cum eo que*m* neque exhibere neque restituere quicquam *oportet*, *ni*si calumniae *i*udicium ei oppositum fu*er*it. *diversae quidem scholae auctoribus placet prohibendum* calumniae iudicio *eum qui arbitrum postulaverit*, quasi hoc ipso confessus videat*ur*, *restituere se* vel exhibere debere. sed alio iure utimur, et recte: *namque* si*ne ullo timor*e *ne supere*tur, arbitrum quisque *postulare potest.*

§ 164. *Ceterum* observare debet is qui *vol*e*t ar*bi*trum* p*etere*, ut *sta*t*im* petat, antequam ex i*ure* ex*e*at, id *est* an*tequam a* P*raetor*e *di*scedat: sero *e*nim petentibus non indulgebi*tur*.

§ 165. *Itaque* si *ar*bi*trum* non *peti*erit, sed *t*aci*tus* de iure exi*erit*, cum periculo res ad exitum perducitur. nam actor provocat adversarium sponsione: *Ni* contra *edictum* Praetoris non *exh*ibu*e*rit aut non res*titu*er*it*: ille autem adversus sponsionem adversarii restipulatur. deinde actor quidem sponsionis *formulam* ed*it* adversario; *ille* *h*uic invicem restipulationis. sed actor sponsioni*s formulae subicit* et aliu*d* iudicium de re restituenda vel exhibenda, ut si sponsione *vicerit*, nisi ei res exhibeatur aut restituatur . . . [*desunt* 48 *lineae*].

instance, of restitution of seisin to a disseisee, or of production of a freedman whose services are required by his patron, the proceedings are sometimes penal, sometimes not penal.

§ 163. When arbitration is demanded by the defendant, a formula arbitraria is delivered, and if the judex directs him to restore or produce anything, he either restores or produces it without further penalty, or he does not restore or produce it, and then he is condemned in its simple value. Neither does the plaintiff incur any penalty for suing a defendant who is not obliged to produce or restore, unless he is sued in return for vexatious litigation. For though some have held that the demand of arbitration precludes the defendant from suing for vexatious litigation, as an admission of the plaintiff's right, the contrary view has justly prevailed; for a defendant may confide in the justice of his cause, and yet prefer arbitration.

§ 164. The defendant must be careful, if he wishes to demand an arbiter, to make the demand at once before he leaves the court or tribunal of the praetor; for a subsequent demand will not be granted.

§ 165. If he leaves the court without requesting an arbiter, the proceeding becomes penal: the plaintiff challenges the defendant to wager a sum to be forfeited by the defendant if he has contravened the edict of the praetor by failing to produce or restore; and the defendant challenges the plaintiff to a counter wager of a similar sum to be forfeited by the plaintiff upon the opposite condition. The plaintiff then delivers the formula of the wager, and the defendant delivers the formula of the counter wager. The plaintiff, in addition to the formula of the action on the wager,

delivers the formula of another action (judicium Cascellianum) for the production or restoration of the thing in dispute, upon which, if he obtains judgment in the action on the wager and the thing is not restored or produced, the defendant will be condemned in damages to the amount of its value.

§ 166. *Postquam igitur Praetor interdictum reddidit, fit fructus licitatio; et uter eorum vicerit* fructus licitando, is tantisper in possessione constituitur si modo adversario suo fructuaria stipula*tione cave*rit, cuius vis et potestas haec *est, ut* si contra eum *de possessione* pronun*tiatum* *fue*r*it*, *e*am summam adversario solvat. *nam* inter adversarios qui *Praetore auctore certant, dum* contentio fructus licitationis *est,* scil*icet* q*uia* *possessorem interim* esse *interest, rei possessionem ei Praetor* vendit, *qui plus licetur.* postea alter alterum sponsione provocat: *NISI* ADVERSUS EDICTUM PRAETORIS *POSSIDENTIBUS* NOBIS *VIS* FACTA ESSET. invicem ambo resti*pulan*tur adversus sponsionem vel [4 *lineae*] . . . iudex aput quem de ea *re agitur* illud scilicet requirit *quod* Praetor interdicto co*m*plexus est, id est uter eorum eum fundum easve aedes per id tempus quo interdict*um* redditur nec vi nec clam nec precario possideret. cum iudex id exploraverit, et forte secundum me iudicat*um* sit, adversarium *quidem* et sponsionis et restipulationis summas quas cum eo feci condemnat, et convenienter me sponsion*is* et restipulationis quae mecum factae sunt absolvit. et hoc amplius si aput adversarium meum *p*ossessio *est,* qui*a* is fructus licitatione vici*t*, nisi restituat mihi possessionem, Cascelliano sive secutorio iudicio condemnatur.

§ 166. When a double interdict, Uti possidetis, for instance, has been issued, the interim possession or mesne profits are sold by auction, and the higher bidder of the litigants is placed in possession pending the controversy, provided that he gives his opponent security by the fructuary stipulation, which is conditioned for forfeiting, in the event of losing the cause, the value of the interim profits as fixed by the auction. . . . . Then each party challenges the opponent to wager a sum to be forfeited by the promisor if he has contravened the interdict by violently disturbing the possession of the promisee, and each party, after binding himself as promisor in a wager, becomes the promisee in a similar counter-wager; whereas in the simple interdicts, as we have seen, there is only one wager and one counter-wager. The judex who tries the action on the wager determines the question left undetermined in the interdict, namely, which party was in possession of the house or land in question, without violence, clandestinity, or permission, in respect of the other. If the judex determines this in my favour, he condemns my adversary in the penal sums of the actions on the wager and counter-wager in which I was promisee, and absolves me in the actions upon the wager and counter-wager in which I was promisor; and, if my opponent is in possession as higher bidder in the auction,

unless he restores possession, he is condemned in the action called Cascellianum or Secutorium.

§ 167. Ergo is qui fructus licitatione vicit, si non probat ad se pertinere possessionem, sponsionis et restipu*la*tionis et fructus licitationis summam poenae nomine solvere *et* praeterea possessionem restituere iubetur: et hoc amplius fructus quos *inter*ea percepit reddi*t*. summa enim fructus licitationis non pretium est fructuum, sed poenae nomine solvitur, quod quis aliena*m* possessionem per hoc tempus retinere et facultatem fruendi na*n*cisci conatus est.

§ 167. So that if the higher bidder in the auction fails to prove that he had possession, he is ordered to pay the sums of the wager and counter-wager in which he was promisor, and the price he offered for the mesne profits at the sale by auction, by way of penalty; and further, to restore possession of the thing in question, and restore any profits of which he has had perception; for the price fixed by the auction is not paid in purchase of the profits, but as a penalty for the temporary appropriation of the possession and source of profit that belonged to another.

§ 168. Ille autem qui fructus licitatione victus est, si non probar*i*t ad se pertinere possessionem, tantum sponsionis et restipulationis summam poenae nomine debet.

§ 168. If the lower bidder in the auction fails to prove that he had possession, he is only condemned to pay the sum of the wager and counter-wager by way of penalty.

§ 169. Admonendi tamen sumus liberum esse ei qui fructus licitatione victus erit, omissa fructuaria stipulatione, sicut Cascelliano sive secutorio iudicio de p*ossessione re*ciper*and*a *ex*peri*tur*, ita se*paratim* et de fructus licitatione ag*ere*: *in* quam r*em* proprium iudicium co*m*paratum est, quod appellatur fructuarium, quo nomine actor *iudicatum solvi* satis accipi*e*t. dicitur autem et hoc iudicium secutorium, quod sequitur sponsionis victoriam; sed non aeque Cascellianum vocatur.

§ 169. It is open to the lower bidder, if he succeeds in the action on the wager in which he is promisee, instead of proceeding on the fructuary stipulation, just as he brings the Cascellianum or Secutorium action for recovering possession, to bring an action upon the sale by auction which is called fructuarium, in which he is entitled to security with sureties for satisfaction of judgment; which action, like the action for recovering possession, as following the result of the action on the wager is called Secutorium; but is not, like the action for recovering possession, also called Cascellianum.

§ 170. Sed quia nonnulli interdicto reddito cetera ex interdicto facere nolebant, atque ob id non poterat res expediri, praetor in eam rem prospexit et comparavit interdicta, quae secundaria appellamus, quod secundo loco red-

§ 170. As sometimes, after the issue of an interdict, one of the parties declined to take one of the subsequent steps, and the proceedings came to a stand-still, the praetor has provided for this contingency, and invented the so-called

duntur: quorum *vis et potestas haec est, ut qui* cetera ex interdicto non faciat, velut qui vim non faciat, aut fructus non liceatur, aut qui fructus licitationis satis non det, aut si sponsiones non faciat, sponsionumve judicia non accipiat, sive possideat, restituat adversario possessionem, *sive non possideat vim* illi possidenti ne faciat.

secondary interdicts, which in such a case are issued: whose effect is, that if a party decline to take any necessary step in the interdict procedure, such as the violent disseisin, or the auction of the mesne profits, or finding bail for the penal sum fixed by the auction, or the wager, or the trial on the wager, if in possession he shall be ousted, if out of possession he shall not afterwards be entitled, by making the violent disseisin, to continue the proceedings in Utrubi or Uti possidetis (?)

Interdicts are characterized by Gaius as proceedings wherein the praetor *principaliter* auctoritatem suam interponit. Principaliter may simply refer, as was assumed in the first edition, to the chronological order of steps in legal proceedings; and then interdict procedure will be characterized by the fact that it opens with a command of the praetor (interdictum) whereas ordinary procedure opened with an act of the plaintiff (in jus vocatio) and the praetor's authority was not very signally manifested, at least in statute-process, till the stage of execution (addictio, missio in possessionem). But Bethmann-Hollweg, § 98, seems correct in giving a less insignificant meaning to the term which expresses the essential contrast of Interdict and Action, and interpreting the word principaliter as expressive of the pre-eminence, supremacy, or absolute power, of the praetor in the sphere where interdicts were employed. The contrast then will be between the jurisdictio of the praetor and his imperium. In his jurisdictio his functions are merely ministerial or ancillary to those of the legislator: in his imperium, as conservator of order, custodian of the peace (to use modern phrases), and repressor of violence, he is invested with a portion of the legislator's sovereign power. This antithesis of LEGISLATOR and ADMINISTRATOR meets us in several fundamental classifications of Roman jurisprudence: it has already been indicated in connexion with the contrasted terms, judicia legitima and judicia imperio continentia: and the present is a fitting place for again noticing some of its principal aspects.

(1) Statute-process and the Formulary system are contrasted by the respective predominance in each of the legislator and admi-

nistrator. In Legis actio the Legislator and the Litigants seem alone to occupy the scene. The Praetor is only present as master of the ceremonies, and even as such can only utter sentences which the Legislator has previously dictated. In the Formulary system the Praetor appears with much larger attributions; he seems to have stepped in front of the Legislator and has taken much of the initiative from the Suitors. Thus, marking the respective prominence of the STATUTE and the ADMINISTRATOR, we might denominate the older and younger systems as Legis actio and Praetoris interpositio: and it is this accentuation of the statute-book or lawgiver as opposed to the tribunals or executive that the translation has attempted to express in offering the invented term Statute-process as a version of Legis actio.

(2) Both Statute-process and the Formula, as representing at different periods the Ordo judiciorum or ordinary course of procedure, exemplify the predominance of the lawgiver as contrasted with that of the magistrate, when opposed to extraordinary procedure or Cognitio extraordinaria praetoris. The latter was the appropriate procedure in plaints of children against their parents or slaves against their owners, victims to whom the civil law accorded no rights: or in grievous damnification (laesio) occasioned by some exceptional condition (justa causa)—fraud, violence, absence, ignorance, minority (p. 152)—so exceptional that it had been overlooked or disregarded in the rules of jus strictum respecting dispositions and the modes of acquiring dominion. In these and other cases, e.g. claims of honorarium (p. 432) for liberal services, which in infant society had been gratuitous or only recompensed by political power: claims under testamentary trusts which had not been recognized when the rules regarding testamentary dispositions were crystallizing: the praetor by his inquisition and decree (p. 572) superseded not only the judex but also the lawgiver, who had uttered no commands respecting the various circumstances above enumerated. Respecting trusts compare the statement of Justinian: Fideicommissa . . . . nullo vinculo juris, sed tantum pudore eorum qui rogabantur, continebantur. Postea primus divus Augustus semel iterumque . . . . jussit consulibus auctoritatem suam interponere. Quod . . . . paulatim conversum est in assiduam jurisdictionem . . . . ut paulatim etiam praetor proprius crearetur qui de fideicommissis jus diceret, Inst. 2, 23, 1.

(3) The same antithesis meets us as a principle of division even

within the limits of Ordo judiciorum. Here we find on the one hand the class of actiones legitimae, actions of civil law, including under one of the wider acceptations of civil law actiones ex bona fide; and on the other the class of actiones praetoriae, that is, actiones fictitiae and actions with a formula in factum concepta. In the latter class the praetor, except so far as he abstained with a demure deference from inserting in the formula the sacred term Oportere, certainly exercised the attributions of a legislator. A similar, though not identical division, as already has been mentioned, p. 573, was that into judicia legitima and judicia imperio continentia; a division that, speaking roughly, corresponded to the functions of the praetor in imperial Rome and his functions in the subject provinces. This last division, though important in its time, was more purely historic and accidental than the preceding: it has left a less permanent impress on Roman law, and its traces are nearly effaced from the compilation of Justinian.

4. Interdict procedure, as opposed to the regular mode of litigation, is defined by Gaius by the characteristic feature that the magistrate principaliter auctoritatem suam interponit. This feature, as we have now seen, was not peculiar to Interdicts: but if we suppose that Interdicts were coeval with Statute-process and formed a matter of Cognitio extraordinaria; and that, further, the other subjects of cognitio extraordinaria were then imperfectly developed; at such a period Interdicts would form the most signal manifestation of magisterial auctoritas: and it is perhaps to a jurist of this period that the definition we have quoted is due. So large a power of the magistrate must however have seemed, even at Rome, inconsistent with republican liberty: and in Interdict procedure, as we know it, obedience to the praetor's decree is not enforced by the praetor himself but by a judex, and by legal proceedings in the ordinary form; either, that is, by an actio stricti juris or by an actio ex bona fide (formula arbitraria, § 141). Accordingly in the last period we find Interdict procedure opposed to Cognitio extraordinaria and ranked under the contra-distinguished class of Jus ordinarium or Ordo judiciorum: e.g. Ceterum cessat interdictum et succedere poterit notio praetoris (i.e. cognitio extraordinaria) ut apud eum disceptetur utrum quis in potestate sit an non sit, Dig. 43, 30, 3, 3. Thus the Interdict became rather a matter of jurisdictio than of imperium. However it still remained true that in issuing an Interdict the praetor had spoken with the voice of a sovereign. This precept is

not an application of some general command of the legislator, but is itself a law, and will serve as the governing principle of future adjudication. If we describe Law as a universal interdict addressed by the legislator to the community, Interdict may be described as a particular Law addressed by the magistrate to individuals. This will appear more plainly when we come to the details of Interdict procedure.

Interdicts relate to subjects in almost all departments of the code.

A. In jus publicum and jus sacrum we find the interdicts relating to sacred places and public places—public roads or public rivers. These places are protected by interdicta popularia, interdicts in which any individual may vindicate as prosecutor the interests of the public, Dig. 43, 8, 2, 34.

B. In the law of status and the law of domestic relations there are the interdictum de homine libero exhibendo, Dig. 43, 29, a kind of Writ of Habeas Corpus: interdicta de liberis exhibendis and de liberis ducendis, protecting the patria potestas, Dig. 43, 30: and de libertis exhibendis, assisting the patron.

C. In the code of Property (res familiaris) and (1) in the department of res singulae we have the interdicts Utrubi, Uti possidetis, and Unde vi, relating to the possession of movables and immovables: and others, closely allied, similarly related to the subjects of servitudes. In controversies between owners of neighbouring land we have interdictum Demolitorium based on Operis novi nunciatio (an admonition of the defendant to desist from some architectural innovation), an interdict requiring the demolition of the building erected in spite of such prohibition on the part of the plaintiff (nuncians), and before such prohibition was set aside by judicial authority, Dig. 39, 1: and the interdict Quod vi aut clam, similarly requiring the restitution or undoing of some innovation in land (polluting streams, cutting trees, ploughing up pasture, &c.) that has been executed either furtively or in face of the prohibition of some party who is interested and who has jus prohibendi, Dig. 43, 24: and other interdicts de arboribus caedendis and de glande legenda, Dig. 42, 27, 28, enforcing provisions of the Twelve Tables.

I said that interdicts were to be found in *almost* all departments of the code. It is observable that no interdicts are employed under the code of Obligation (choses in action, jus in personam) except in cases which combine obligation with a real right (jus in

rem). Thus interdictum Salvianum, § 147, protects the landlord in the recovery of his rent by enforcing his pignus on the movables of the lessee.

(2) In the code of rerum universitas we have the interdicts Quorum bonorum, § 144, and Quod legatorum, Dig. 43, 4, in aid of the universal successor.

D. In the code of Procedure we have the interdicts Quem fundum, Quam hereditatem, Quem usumfructum, § 89, and the interdicta Secundaria, § 170, compelling a defendant in a real action to defend himself in the mode prescribed by the legislator under pain of forfeiting possession. Here too we may place the interdicts Utrubi and Uti possidetis so far as they are not themselves final suits but only means of determining provisional or interimistic possession during the pendency of the definitive vindicatio: and here too, if we look on Quorum bonorum as standing to hereditatis petitio in the same relation in which Uti possidetis stands to vindicatio, i. e. as merely preparatory to the final suit, we may place the interdict Quorum bonorum. At a later stage of proceedings the interdict Ne vis fiat ei qui in possessionem missus erit, Dig. 42, 4, protects the creditor who has obtained execution. The interdictum fraudatorium protects the creditor against fraudulent alienation by an insolvent debtor, Dig. 42, 8: the interdictum possessorium and interdictum sectorium, § 145, protect the purchaser of the estate of the insolvent or the condemned criminal.

As an alternative to some of these interdicts, the plaintiff had his option of an actio in factum: e. g. an alternative to interdictum Salvianum was actio Serviana, § 35; and an alternative to interdictum fraudatorium was actio Pauliana.

§ 140. Restituere in respect of the acts which it denotes is a word of many meanings, and comprehends several acts which in physical character have little in common but the name. Sometimes it means the demolition of an unlawful structure: e. g. Quod in flumine publico ripave ejus fiat, sive quid in id flumen ripamve ejus immissum habeas, quo statio iterve navigio deterior sit, fiat, restituas, Dig. 43, 12, 1, 19. 'What you have built in a public river or on its bank, or what you have discharged into the river or on to its bank, interfering with the anchorage or passage of vessels, I command you to demolish and remove.' Sometimes it means the restoration of possession, as in the interdict Unde vi, § 154; sometimes the delivery of possession, where no possession has preceded,

as in the interdict Quorum bonorum, § 144. But in spite of the variety of physical acts which it denotes, the word Restituere is univocal if we look at its legal connotation, which is always the undoing of some wrong, the reinstatement of a person in the possession and enjoyment of a right.

Exhibere is the production of a thing or person, and was usually the preliminary of a vindication. Quem liberum hominem dolo malo retines exhibeas, Dig. 43, 29, 1. 'The freeman whom you unlawfully detain I command you to produce.' Qui quaeve in potestate Lucii Titii est, si is eave apud te est, dolove malo factum est quominus apud te esset, ita eum eamve exhibeas, Dig. 43, 30, 1. 'The son or daughter of Lucius Titius, who is subject to his power, and whom you detain or have fraudulently ceased to detain, I command you to produce.'

§ 144. The interdict Quorum bonorum, according to Savigny, was the remedy whereby a successor, whether civil or praetorian, and, if praetorian, whether contra tabulas or secundum tabulas or ab intestato, having already, in response to his demand (agnitio) of the succession, obtained from the praetor the formal grant (datio) of bonorum possessio, maintained his title thereto before the tribunals if he met with opposition; just as hereditatis petitio was the remedy whereby the civil successor could have maintained a corresponding claim to the hereditas.

The terms of the interdict ran as follows: Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides, possideresve si nihil usucaptum esset, quodque dolo malo fecisti ut desineres possidere, id illi restituas, Dig. 43, 2, 1. 'Whatever portion of the goods, granted in pursuance of my edict to be possessed by such and such a one, thou possessest as successor or as unentitled occupant, or wouldest so possess but for usucapion, or hast fraudulently ceased to possess, such portion do thou deliver up to such a one.'

Quorum bonorum was the proper remedy against two classes of adversary: (1) any one who claimed as successor (pro herede), either under the praetorian edict, Dig. 5, 3, 11 pr., or as cestui que trust (fideicommissarius), Dig. 5, 3, 20, 13, or at civil law; and (2) praedo, or any one who seized and held without title, or merely by title of occupancy (pro possessore), in virtue of the anomalous law which permitted strangers to seize vacant hereditaments, and convert possession into ownership by a short period of usucapion,

2 § 52. If the adversary claimed on any other title, e. g. pro empto or pro donato, the proper remedy of bonorum possessor or heres was not by Quorum bonorum nor by Hereditatis petitio, but by an ordinary Real action (Rei vindicatio). The words 'possideresve si nihil usucaptum foret' are a trace of the Sc. Juventianum, which relieved the bonorum possessor against usucapion, i. e. which rescinded the usucapion, and allowed Quorum bonorum to be brought even after usucapion had been completed and the bona fide putative successor or the mala fide unentitled occupant no longer possessed pro herede or pro possessore, but pro suo, 2 § 57. (According to Puchta, usucapion was always unavailing against Quorum bonorum, and the effect of Sc. Juventianum was only to assist the heir at civil law, by inserting in the formula of Hereditatis petitio a clause that had always as a matter of course been inserted in the interdict Quorum bonorum.)

According, then, to Savigny, Quorum bonorum was a definitive suit in matters of succession when the plaintiff, instead of claiming hereditas in reliance on jus civile, claimed bonorum possessio in reliance on jus praetorium. But the prevalent opinion is that of Vangerow, that Quorum bonorum was merely a summary and provisional procedure for obtaining possession pending the definitive suit for the succession. Such possession was defeasible (sine re) by an adverse decision of the final suit, which, if the succession was by civil law, would be hereditatis petitio; if it was merely praetorian, as founded on cognatio &c., hereditatis petitio possessoria, Dig. 5, 5, 1. In support of this view, it may be observed that on Savigny's hypothesis no satisfactory account can be given of the nature of hereditatis petitio possessoria.

§ 148. In the real actions of statute-process or the eldest system the procedure for awarding provisional possession during the pendency of a suit was called Vindiciae dicendae, Gellius 20, 10. In the later methods of real action, vindicatio per sponsionem or per formulam petitoriam, Vindiciae dicendae was apparently superseded by the interdicts Utrubi and Uti possidetis; which, accordingly, would bear the same relation to vindicatio that Quorum bonorum bore to hereditatis petitio.

As these interdicts were required to determine the question who should have possession pending the vindicatio, so it is clear that a third anterior proceeding would be necessary to determine who should have provisional possession during the pendency of

litigation on the interdict: and similarly we might imagine a fourth, a fifth, and in fact an infinite series of anterior proceedings to be required. We shall find however that this regressus ad infinitum was stopped at the third term by means of an auction (fructus licitatio), § 166, a process of a very summary character. If a party attempted to defeat this provision by refusing to take part in the auction, his opponent was aided by interdicta Secundaria, § 170. It may seem that opposition to the issue of interdicta Secundaria would again open out a vista of an infinite series of anterior steps; but, doubtless, the only means of preventing the issue of interdictum Secundarium was an instant consent to co-operation in fructus licitatio.

Fructus licitatio was obsolete in the time of Justinian: in modern Italy and Germany it is superseded by a process called Summariissimum; in which the judge on a brief inquisition provisionally awards possession to the party who proves the last act of undisturbed possession.

The interdict Uti possidetis was of the following form: Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto. De cloacis hoc interdictum non dabo: neque pluris quam quanti res erit, intra annum quo primum experiundi potestas fuerit, agere permittam, Dig. 4, 3, 17, 1. 'Whichever party has possession of the house in question, without violence, clandestinity, or permission in respect of the adversary, the violent disturbance of his possession I prohibit. Sewers are not included in this interdict. The value of the thing in dispute and no more may be recovered within the first year of days available for procedure (annus utilis, p. 255).' A form nearly identical is preserved in Festus: Uti nunc possidetis eum fundum quo de agitur, quod nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis vim fieri veto. The right of the possessor was not affected if his possession was commenced by violence, clandestinity, or permission in respect of any other person than the defendant. Nam uti possidetis interdicto is vincebat qui interdicti tempore possidebat, si modo nec vi nec clam nec precario nactus fuerat ab adversario possessionem, etiamsi alium vi expulerat, aut clam abripuerat alienam possessionem, aut precario rogaverat aliquem ut sibi possidere liceret, Inst. 4, 15, 4.

The interdict Utrubi was of the following form: Utrubi hic homo

therein, shall be recoverable by action within a year; after the expiration of a year he shall only recover what came into the hands of the dispossessor.' That is to say, the distinction between vis armata and vis quotidiana was no longer recognized. Savigny's opinion, that in virtue of this constitution the interdict Unde vi became applicable to movables as well as to immovables, is not generally adopted.

Although violence, armed or unarmed, was prohibited to be employed for the recovery of possession even from possessor vitiosus, yet to repel violence by violence in the defence of possession was permitted. Eum igitur qui cum armis venit possumus armis repellere, sed hoc confestim, non ex intervallo, dummodo sciamus non solum resistere permissum ne dejiciatur, sed et si dejectus quis fuerit, eundem dejicere non ex intervallo sed ex continenti posse, Dig. 43, 16, 3, 9. 'An armed aggressor may be lawfully repelled by arms, but this must be immediately, and we may not only resist disseisin, but eject the disseisor, provided that no interval has elapsed.' Qui possessionem vi ereptam vi in ipso congressu recuperat, in pristinam causam reverti potius quam vi possidere intelligendus est. Ideoque si te vi dejecero, illico tu me, deinde ego te, unde vi interdictum tibi utile erit, Ibid. 17. 'A possessor who is violently disseised and recovers seisin by immediate violence, rather restores his former position than possesses by violence. Therefore, if I oust you by violence, and am immediately ousted by you, and then oust you again, you may have the interdict Unde vi.'

We have seen that Uti possidetis and Utrubi, though called interdicts Retinendae possessionis, were also in effect interdicts Recuperandae possessionis whenever any of the vitia possessionis was established: that if the possession of the actual possessor was tainted with one of three vices, if it was not adverse (open and unauthorized) and commenced without violence (vi, clam, aut precario), then his adversary recovered possession. What, then, it may be asked, was the use of a distinct interdict Recuperandae possessionis, the interdict Unde vi, which, like the Uti possidetis, was only available for a year? The answer is, that Uti possidetis only restored possession when the dispossessor was in present possession; it gave no redress when a third party was the present possessor: in such cases the party dispossessed required a different remedy, and this was given him in the interdict Unde vi. Further, by Uti possidetis the intermediate profits (fructus) were only re-

coverable from the commencement of the suit, by Unde vi from the time of the ejectment; and the remedy of the disseisee by Uti possidetis was barred by the vices of his own possession, not so his remedy by Unde vi.

As violent dispossession was remedied by the interdict Unde vi, so other interdicts remedied dispossession whose inception was clandestine or permissive. An interdict De clandestina possessione seems to be mentioned, Dig. 10, 3, 7, 5. But it would scarcely be required in the case of immovables, for as a possessor was not disseised until he had notice of the invasion, he could immediately by attempting an entry convert the clandestine into a violent dispossession. Nor would it be required for movables, for clandestine dispossession of a movable might be redressed by Utrubi combined, perhaps, with an exhibitory interdict or order of production. Accordingly, it is generally supposed that no special interdict against clandestine dispossession ever existed.

The interdict De precario was in these terms; Quod precario ab illo habes, aut dolo malo fecisti ut desineres habere, qua de re agitur, id illi restituas, Dig. 43, 26, 2. 'The possession of the thing in question which thou holdest by the permission of such a one, or hast fraudulently ceased to hold, do thou restore to him.'

Before we quit this topic we may take the opportunity of considering some of the respects in which the disposition called Precarium differed from a closely allied institution, the contract called Commodatum.

(1) Precario rogans (the precarious tenant) generally had possession: Commodatarius (the borrower) never had more than detention.

(2) The obligation in Precarium is purely unilateral and on the side of precario rogans. Precario dans (the grantor of precarious tenancy) is under no obligation, not even the semi-bilateral obligation for impensae &c., which is incumbent on Commodans (the lender).

(3) Precario rogans is not, like Commodatarius, responsible for diligentia, Dig. 43, 26, 8, 3.

At a late period of Roman law Precarium was so far regarded as a contractual obligation that Precario dans could recover by an actio praescriptis verbis, Dig. 43, 26, 2, 2, and 19, 2. Thus Precario dans had two remedies, an action on delict (interdictum de precario), for such, we shall see, was the nature of the possessory

interdicts, and an action on contract: Commodans had only his action on contract; for interdicts, as we have stated, were not employed in matters of contractual obligation.

§ 156. Paulus mentioned a fourth class of interdicts, namely, those for either acquiring or recovering possession. Sunt etiam interdicta duplicia tam recuperandae quam adipiscendae possessionis, Dig. 43, 1, 2, 3. These are the restitutory interdicts, Quem fundum, Quam hereditatem, Quem usumfructum, which have been already quoted, § 89, whereby, if the defendant in a real action refused to give security judicatum solvi, possession was transferred to the plaintiff, who in some cases would acquire, in others recover possession. Quem fundum was the interdict employed in Vindicatio: Quam hereditatem in Hereditatis petitio: Quem usumfructum in the vindication of a Personal servitude. In interdict procedure, instituted for the retention of possession, analogous functions were performed by further interdicts called interdicta Secundaria, § 170.

Pending litigation respecting Urban servitudes the plaintiff was protected by a peculiar institution, the interdictum Demolitorium based on Operis novi nuntiatio, the nature of which demands a passing notice. If A, a proprietor or owner of some real right (mortgagee, emphyteuta, superficiarius), was aggrieved by some architectural innovation (aedificatio, demolitio) on the part of B, whereby an urban servitude over the tenement of A was asserted or some servitude belonging to A, as owner of a dominant tenement, was violated, A was entitled to serve a formal inhibition or private injunction on B (prohibitio, operis novi nuntiatio) summoning him to desist from the innovation. On this summons B was bound to desist from his work until he obtained from the praetor a dissolution or discharge of the summons (remissio, missam facere nuntiationem): which discharge, except under certain special circumstances, could only be obtained by B's entering into a satisdatio or cautio de demoliendo, security that the structure should be demolished in the event of A as plaintiff succeeding in a future actio Negatoria or Confessoria, i.e. establishing his own jus prohibendi, which would be the same as disproving B's jus aedificandi. If without obtaining such remissio B persisted in his work, he was compelled to demolish it by the interdictum Demolitorium. If he desisted from the work for the present, but refused to oppose A's suit in the regular course by entering into satisdatio judicatum solvi, it was the duty of the judge to compel him to enter into a stipulation

that he would not again attempt to build before he established his own jus aedificandi, or disproved A's jus prohibendi, as plaintiff in a suit. This would be actio negatoria of a jus altius non tollendi, if he denied that he was ever under a servitude to the tenement of A: actio confessoria of jus altius tollendi, if he affirmed that the servitude was extinguished by usucapio libertatis, Dig. 39, 1, 15: or some other actio confessoria if he claimed a dominant servitude over the tenement of A.

Pending disputes on wrongs relating to land a similar function was discharged by the interdictum Quod vi aut clam. On a prohibitio from a neighbour, who might have a real right or be a mere lessee, prohibitus was obliged to desist from any agricultural innovation (ploughing up pasture, cutting trees, polluting streams, &c.) until he offered security (satisdatio judicatum solvi) in any suit in which he might be made defendant, Dig. 43, 24, 3, 5; or proved his jus faciendi, or in other words, disproved his neighbour's jus prohibendi, as plaintiff in some real action or in Uti possidetis, Dig. 43, 17, 3, 2. If he persisted in his operation in spite of the prohibitio, the interdictum Quod vi aut clam compelled him to efface it and to pay damages for the harm it occasioned.

The interdicts which Gaius calls double are called by Ulpian mixed. Mixtae sunt actiones, in quibus uterque actor est, utputa finium regundorum, familiae erciscundae, communi dividundo, interdictum Uti possidetis, Utrubi, Dig. 44, 7, 37, 1. 'Mixed actions are those wherein each party is both plaintiff and defendant, as the action for tracing boundaries, for partition of an inheritance, for dissolution of joint ownership, and the interdicts Uti possidetis and Utrubi.' The effect of this duplicity or mixture of characters was that the plaintiff, as well as the defendant, was liable to condemnation and absolution. According to Justinian, the three personal actions just named are called Mixed because they involve questions both of property and obligation, Mixtam causam obtinere videntur, tam in rem quam in personam, Inst. 4, 6, 20. Another effect of the duplicity of the interdicts was, as we shall presently see, to increase the number of stipulations in the proceeding by Sponsio.

In the system of statute-process (legis actio), Vindicatio was a judicium duplex. The contention of the defendant was not merely a negation of the plaintiff's claim, but also an affirmation of the defendant's claim, a contravindication. Praetor interrogat eum qui cedit an contravindicet, 1, § 24. It was not necessary that

the cross claims of the plaintiff and defendant should be identical in character. On the one side there might be a claim of status (libertas), on the other of property (dominica potestas), one party vindicating as free the person whom another claimed as slave: or one party vindicating the freedom of a person whom another, as transferee of patria potestas, claimed to be his bondsman (mancipium); or one party asserting the independence (sui juris) of a person whom another claimed as filius familias or as subject to patria potestas.

Similarly Hereditatis petitio would be judicium duplex; for Hereditatis petitio is a species of Vindicatio.

Vindicatio and Hereditatis petitio are related to the actions Communi dividundo and Familiae herciscundae as wholes to parts: the former lay claim to integral ownership and integral succession where the latter merely claim partial ownership and partial succession. The former became judicia simplicia in the later system of law, while the latter remained judicia duplicia. Ihering, § 52.

In English jurisprudence both parties are said to be equally plaintiffs and equally defendants in the actions called Quare impedit and Replevin.

Uti possidetis was sometimes judicium simplex. We may distinguish three applications of this procedure:

(1) When both parties claim to be in actual possession and one of them is found to be truly in possession without a taint of violence, secrecy, or permission. Uti possidetis is then really an interdictum Retinendae possessionis.

(2) When the possession of the actual possessor is found to be vitiated by violence, secrecy, or permission, he is displaced, and the non-possessor is reinstated. Uti possidetis is then in substance and effect interdictum Recuperandae possessionis. In both of these cases it is judicium duplex.

(3) Uti possidetis might further be brought against a defendant who made no contention that he himself was or ought to be in possession, but who was guilty of some disturbance or molestation of the possessor; e. g. by prohibitio: Qui colere fundum prohibetur, possidere prohibetur, Dig. 43, 17, 3, 4. Eum qui ædificare prohibeatur, possidere prohiberi, manifestum est, Dig. 41, 3, 52, 1. Etenim videris mihi possessionis controversiam facere, qui prohibes me uti mea possessione, Dig. 43, 17, 3, 2. In this case Uti possidetis would be a judicium simplex. Uti possidetis in cases (2) and

(3) is a genuine actio ex delicto. So it was nominally in case (1); but we shall see that here the delict might be merely fictitious (vis ex conventu).

Savigny holds that No. (3) was the original application of Uti possidetis; and that Nos. (1) and (2) were subsequent extensions of its employment and due to jurisprudence, i. e. the ingenuity of the jurists: the reverse is the prevalent doctrine, Baron, § 120.

§ 163. The formula arbitraria in Unde vi must have contained the clause, Unless the defendant obey the judge's order of restitution; the rest is uncertain. The analogy of the other interdicts suggests something to the following effect: If it appear that the defendant has disobeyed the praetor's order to reinstate the plaintiff, then, unless the defendant comply with the judge's order of restitution, do thou, judge, condemn him in all the damages the plaintiff shall have sustained.

The mode of restitution would be prescribed by the judex, who would probably require the restitution of all movables that had been removed, though these were not mentioned in the original form of the interdict, § 154.

The jurists who considered that a defendant who desired a formula arbitraria was guilty by confession of the delict laid to his charge, must have supposed that the only function of the judex in this case was assessment of damages (litis aestimatio), Dig. 9, 2, 25, 2.

§ 165. Huschke supposes that the sponsio on Quorum bonorum was of the following form: If the praetor Quintus Caepio in accordance with his edict has granted me possession of the goods left by Turpilia, and if in contravention of his edict thou hast not restored to me the portion of those goods which thou possessest as successor or as occupant, or hast fraudulently ceased to possess; dost thou promise to pay me such and such a sum? I promise.

The stricti juris action based on this stipulatio would be followed by another, which was doubtless called judicium Secutorium, § 166. The latter would probably contain an intentio in factum concepta, of the form: Si Aulus Agerius Numerium Negidium sponsione vicit, and a formula arbitraria such as that already described for the non-penal procedure: Ni Numerius Negidius Aulo Agerio bona illa judicis arbitrio restituat, quanti ea res erit, judex, Numerium Negidium Aulo Agerio condemna.

After the first appearance before the praetor (in jus vocatio) and the issue of the interdict (interdictum redditum or editum) it would

be necessary to wait a certain time to see whether it was obeyed or disobeyed by the defendant; and if it was disobeyed, there would be at any time within the period of a year a second in jus vocatio for the nomination of the judex and the delivery of the formula arbitraria, if the procedure was non-penal; or for the sponsio and delivery of the formulas of action on the sponsio and the judicium secutorium, if the procedure was penal.

The interdict or command of the magistrate, like the law or command of the legislator, has two members (protasis and apodosis); or two terms, an antecedent (a title expressed by the middle term B) and a consequent (an obligation expressed by the major term A). The antecedent term is usually introduced by a relative (*Quorum* bonorum, *Unde* dejecisti, *Uti* possidetis, &c.) equivalent to a *Si:* accordingly any interdict may be paraphrased by the proposition: If such and such antecedent title exists, then thou art under such and such consequent obligation: and this antecedent, simple as it may appear, is usually analysable into a variety of conditions. Thus in Quorum bonorum the antecedent clause and question for the judex is not only whether certain goods are detained by the defendant, but also whether the plaintiff had obtained a grant of possession of these goods, whether such grant was rightfully obtained and in accordance with the provisions of the edict, &c.

§ 166. From the two sponsiones and two restipulationes which are mentioned, it appears that Gaius is now speaking of double interdicts, and from the words eum fundum easve aedes it appears that he is speaking not of Utrubi but of Uti possidetis.

After a first in jus vocatio in which an interdict Uti possidetis had been obtained, there took place, by prearrangement, a molestation of one of the litigants by the other. In the disorderly beginnings of society this molestation was doubtless often in reality a turbulent defiance of the magisterial interdict: but in more orderly periods both parties would be desirous of trying their right by legal course, and the steps taken by both would be prearranged with a view of satisfying the conditions of interdict procedure (vis ex conventu). So a trespass, or at least an act that contains many of the elements of a trespass, is often arranged to be committed for the purpose of enabling parties to try a right before English tribunals.

After the vis ex conventu had been simulated, there took place a second in jus vocatio, at which the parties entered into five different stipulations.

Just as interdict procedure was necessary in order to determine which litigant should have interim possession pending the vindicatio, so it was necessary to determine who should have interim possession pending a possibly protracted interdict procedure. This was accomplished by means of Fructus licitatio, which took place in the second appearance before the praetor, and was followed by (*a*) the Fructuaria stipulatio.

Each party then wagered a penal sum in two characters, for each party was both plaintiff and defendant: and, as a sponsio was a unilateral contract, in order to produce a bilateral contract, that is, to bind both parties and constitute a single bet or wager in the modern sense of the term, it was necessary to have two stipulations, that is, a sponsio and a restipulatio. For the purpose, therefore, of making two wagers the parties entered into four stipulations (two sponsions and two restipulations); i. e. (*b*) one sponsio and (*c*) one restipulatio in which a litigant was promisor and promisee as plaintiff, and (*d*) a second sponsio and (*e*) a second restipulatio in which he was promisor and promisee as defendant. The sponsio would be a stipulation to the following effect: Si adversus edictum praetoris possidenti mihi vis a te facta est, tot nummos dare spondes? Spondeo: the restipulatio to the following effect: Si adversus edictum praetoris possidenti tibi vis a me facta non est, tot nummos dare spondes? Spondeo. Thereby each party would be bound to pay, or entitled to receive, two penal sums, according as the actions brought on these four stipulations decided the issue which the stipulations raised.

A judex was then appointed who tried the four actions.

Then if the victor in the four actions had not been the higher bidder at the Licitatio, the judex decided a fifth and sixth action: namely one called judicium Secutorium or Cascellianum, which had a formula arbitraria, and whereby possession of the movable or immovable was recovered from the higher bidder; and another on (*a*) the Fructuaria stipulatio, to recover from the higher bidder a penal sum equal to the value of the fructus.

Instead of suing on (*a*) the Fructuaria stipulatio the victor had the option of bringing judicium Secutorium for the recovery of this penal sum, and then he was protected against the event of his opponent's insolvency by sureties (satisdatio). It may be asked what compensating disadvantage of this course should ever induce the victor to sue on (*a*) Fructuaria stipulatio. Perhaps, as Krueger

suggests, if he sued for the penal sum by Secutorium with satisdatio, then when he brought Cascellianum he only recovered the Res without the interim fructus. The satisdatio would thus increase his certainty of obtaining the amount of the penal sum, but would diminish by the value of the fructus the total amount recovered.

Corresponding to the penal sum incurred by Fructus licitatio, and secured by (*a*) Fructuaria stipulatio or Satisdatio of the litigant who obtains possession pending interdict procedure, was the liability in twice the value of the fructus incurred by the litigant who obtained possession by Vindiciae dicendae pending statute-process. Such at least appears to be the import of a partly conjectural fragment of the Twelve Tables: Si vindiciam falsam tulit, stlitis et vindiciarum praetor arbitros tres dato: eorum arbitrio possessor fructus duplione damnum decidito. Festus. 'When temporary possession has been wrongfully obtained, the question of property and the value of the fruits of possession shall be decided by three arbiters, by whose arbitration the wrongful possessor shall pay as a penalty twice the value of the fruits of possession to the true proprietor.'

§ 170. From this paragraph, which has been restored by Krueger from the apograph published by Studemund, it appears that as in Real actions the defendant who declined to give satisdatio judicatum solvi and thus impeded the unwinding of the process of vindicatio was deprived of possession by the interdicts Quem fundum, Quam hereditatem, Quem usumfructum, § 156 com.; so a suitor whose contumacious refusal to take the regular steps prevented interdict procedure from accomplishing its normal course was deprived of possession by interdicta Secundaria.

The mention of VIS (qui VIM non faciet) shows that, subsequent to the issue of the interdict and antecedent to further proceedings, one act of the forensic drama was a conventional ejectment (vis ex conventu); which may be identified with what is called Deductio quae moribus fit in suits by Sponsio, and perhaps with the Manuum consertio in Sacramentum, § 91 com.

The inquiry into the nature of POSSESSION has been purposely postponed hitherto in order not to interrupt the exposition by Gaius of the details of the possessory interdicts (Utrubi, Uti possidetis, Unde vi); i.e. those interdicts in which the fact of possession is itself a title to the continuance or restoration of possession.

Possession may be defined as a relation which consists of two elements; Detention, or physical power over a thing, and Animus domini, a certain intention on the part of the detainer, the intention of holding it as proprietor, of deriving from it the benefits of ownership. Theophilus, the colleague of Tribonian and author of the Greek version of Justinian's Institutes, says: νέμεσθαί ἐστι τὸ ψυχῇ δεσπόζοντος κατέχειν, 3, 39, 2. The meaning of this definition will best appear from an examination of the instances in which according to the jurists Possession does or does not exist; and in particular from the contrast of the cases where Possession is present with those where Detention is present but Possession absent.

Possession, as opposed to Detention, is called Possessio civilis, or simply Possessio, or juristic possession.

Mere Detention is called Custodia, In possessione esse, Possessio naturalis.

The characteristic of possessio civilis is the combination of Detentio with the Animus domini: but in certain singular or abnormal instances we shall find that this differentia is wanting, and detention in the name of another owner (alieno nomine), i.e. possessio naturalis, is treated as if it were juristic possession.

Possession, accompanied with certain other extraneous conditions, namely Titulus and Bona fides, is transformed by a certain lapse of time into dominion; and is called Usucapion-possession. Our present purpose is with Possession apart from these foreign elements: the Possession which, as protected by Utrubi, Uti possidetis, and Unde vi, is often called Interdict-possession.

The slave and filiusfamilias had no possession. Quod ex justa causa corporaliter a servo tenetur id in peculio servi est, et peculium quod servus civiliter quidem possidere non potest sed naturaliter tenet, dominus creditur possidere, Dig. 41, 2, 24. 'When a slave has detention on just grounds, the thing is in his peculium, and his master has possession.' Qui in aliena potestate sunt, rem peculiarem tenere possunt, habere et possidere non possunt, quia possessio non tantum corporis sed et juris est, Dig. 41, 2; 49, 1. 'A person under power has detention of a peculium but not possession, for the conditions of possession are not purely physical, but partly legal.' We must except the peculium castrense and quasi-castrense. Filiusfamilias in castris adquisitum usucapiet, Dig. 41, 3, 4, 1. 'What a filiusfamilias acquires in the field is converted by possession into property.'

A manager or agent (procurator) has detention, not possession. Nec idem est possidere et alieno nomine possidere, nam is possidet cujus nomine possidetur. Procurator alienae possessioni praestat ministerium, Dig. 41, 2, 18. 'Possession differs from detention in the name of another, for he has possession of a thing in whose name it is held. An agent is the instrument of another person's possession.' Generaliter quisquis omnino nostro nomine sit in possessione, veluti procurator, hospes, amicus, nos possidere videmur, Dig. 41, 2, 9. 'The occupation of a procurator, guest, or friend in our name is our possession.'

A borrower has only detention, the lender retains possession. Rei commodatae et possessionem et proprietatem retinemus, Dig. 13, 6, 8.

A lessee (conductor) has detention, the lessor (locator) possession. Et fructuarius, et colonus, et inquilinus sunt in praedio et tamen non possident, Dig. 43, 26, 6, 2. 'The usufructuary, tenant, and lodger have occupation, but not possession.' Per colonos et inquilinos aut servos nostros possidemus, Dig 41, 2, 25, 1. 'Our farmers, lodgers, and slaves are instruments of our possession.'

The Emphyteuta had possession as well as detention. Emphyteusis was originally regarded as a species of locatio or venditio, but Zeno decided that it was a contract sui generis, and governed by its own rules, Inst. 3, 24, 3. The relation of emphyteuta to dominus was the same as in feudal times the relation of the freeholder or copyholder to the lord. The emphyteuta was grantee of land in perpetuity, subject to payment of a rent. The property remained in the grantor, but the emphyteuta had a jus in rem nearly amounting to property, for he could alienate the land and recover it by vindication from any possessor and, as long as he paid his rent, from the grantor, Dig. 6, 3. The dominus probably retained usucapion-possession.

The mortgagor had by a legal fiction usucapion-possession, the mortgagee had interdict-possession. Qui pignori dedit ad usucapionem tantum possidet; quod ad reliquas omnes causas pertinet, qui accepit possidet, Dig. 41, 3, 16. The mortgagee could recover the pledge by actio in rem quasi Serviana, Inst. 4, 6, 7. Here, then, interdict-possession appears to be a jus in rem, for it is recoverable by vindicatio. But instead of identifying the mortgagee's jus in rem and his interdict-possession, it is more correct to regard his jus in rem and his interdict-possession as distinct though concurrent. In a hypotheca, that is, an agreement without delivery,

the mortgagee acquired no possession. The fictitious usucapion-possession of the mortgagor was in the interest of the mortgagee, whose security against third persons would be corroborated by the usucapion of the mortgagor.

The depositary has mere detention, the depositor has possession. The depositary only acquires possession in one case, that is, when he is made a stake-holder for this very purpose. Rei depositae proprietas apud deponentem manet sed et possessio, nisi apud sequestrem deposita est; nam tum demum sequester possidet: id enim agitur ea depositione ut neutrius possessioni id tempus procedat, Dig. 16, 3, 17. 'The property and possession of the thing deposited remain with the depositor, except when possession as well as detention is expressly delivered to a stake-holder: for this is the only sequestration where possession passes, the object being to interrupt the usucapion of both litigants.' It seems, then, that in Sequestration not even usucapion-possession can be ascribed to the victor in the suit, Dig. 41, 2, 39.

With Permissive occupation (precarium) possession passes, unless it is expressly agreed that only detention shall pass. Meminisse autem nos oportet, eum qui precario habet, etiam possidere, Dig. 43, 26, 4, 1. 'The occupant by permission has possession.' Is qui rogavit ut precario in fundo moretur, non possidet, sed possessio apud eum qui concessit remanet, Dig. 43, 26, 6, 2. 'The grantee of permissive detention does not possess, but possession remains with the grantor.' The grantor always retained usucapion-possession, Dig. 43, 26, 15, 4.

The defendant in a vindicatio has detention but not necessarily possession. Officium autem judicis in hac actione hoc erit, ut judex inspiciat an reus possideat. . . . Quidam tamen, ut Pegasus, eam solam possessionem putaverunt hanc actionem complecti quae locum habet in interdicto Uti possidetis vel Utrubi. Denique ait, ab eo apud quem deposita sit vel commodata vel qui conduxerit . . . quia hi omnes non possident, vindicari non posse. Puto autem ab omnibus, qui tenent et habent restituendi facultatem, peti posse, Dig. 6, 1, 9. 'Although it is not expressed in his commission, the judex must see whether the defendant is in possession. Some think the same possession is required as for the interdicts; and that, accordingly, the depositary, borrower, hirer, not having such possession, cannot be defendants in a vindication. But, in truth, whoever has detention and the means of restitution, may be made

defendant in a vindication.' In Personal actions the defendant is not called possessor.

The owner of a servitude (jus in re) has no possession. Usufructuarius usucapere servum non potest quia non possidet, Dig. 41 1, 10, 5. 'The usufructuary has no usucapion, for he has no possession.' Naturaliter videtur possidere is qui usumfructum habet, Dig. 41, 2, 12. 'The usufructuary has mere detention.'

[It would be a fallacy to argue that occupation is possession because it is naturalis possessio, just as it would be to argue that nine is ten because it is ten minus one, for an epithet sometimes detracts from, instead of adding to, the connotation of a word.]

As the usufructuary has no possession, it follows a fortiori that the usuary has no possession. [Although the jus in re called usus must be distinguished from possession, the words usucapio, usurpatio show that in the older language usus = possessio.]

Servitudes, though not the subject of possession, were the subject of quasi-possession, § 139, e. g. Fundi possessionem vel ususfructus quasi possessionem, Dig. 4, 6, 23, 2: Si quis longa quasi possessione jus aquae ducendae nactus sit, Dig. 8, 5, 10: which was called juris possessio in contradiction to true possession or corporis possessio; Possessionem vel corporis vel juris, Dig. 43, 26, 2, 3: though if juris possessio was the proper name for possession of a fraction of property, possession that bore the same relation to the totality of property should have been called, not corporis possessio, but dominii possessio.

The quasi-possession of servitudes, like the possession of corporeal things, was protected by interdicts. The possession of rural servitudes, such as iter, actus, via, jus aquae ducendae, &c., was protected by special interdicts: e. g. Quo itinere actuque privato, quo de agitur, vel via hoc anno nec vi nec clam nec precario ab illo usus es, quo minus ita utaris, vim fieri veto, Dig. 43, 19. 'The foot-way, horse-way, carriage-way in question, which thou hast used within a year without violence, clandestinity, or permission in respect of the adversary, the violent hindrance of thy continuing to use I prohibit.'

Urbane servitudes, whether positive, as jus tigni immittendi, or negative, as jus altius non tollendi, being closely connected with possession of an immovable, according to Savigny, were always protected by Uti possidetis: according to Vangerow, the protection of the status quo was always by interdictum Quod vi aut clam or Operis novi nuntiatio, § 355. Personal servitudes,

e. g. usus fructus, usus, fructus, were protected, according to circumstances, by Uti possidetis, Utrubi, or Unde vi, with a special differentiation, which constituted them interdicta *utilia*, Vat. fr. 90.

Four of the cases we have mentioned, the possession of the emphyteuta, the mortgagee, the sequestrator, and the permissive holder, are anomalous; for possession is composed of two elements, physical detention and the purpose of exercising rights of ownership (animus domini), and none of these four possessors can be said to have the animus domini. In these four cases, and these alone, it is necessary to assume that the law recognized a derivative or transferred possession, in which one of the elements of original possession, the animus domini, is absent, and replaced by what may be called the animus alienam possessionem exercendi.

In three of the above-mentioned cases usucapion-possession remained with the proprietor (the dominus agri emphyteuticarii, the mortgagor, the grantor of precarious tenancy), and only interdict-possession passed to the derivative possessor (the emphyteuta, the mortgagee, the grantee of precarious tenancy). In all the four cases (including Sequestration) the dominus lost the protection of the interdicts Retinendae possessionis, which were transferred to the derivative possessors. The grantor of precarious tenancy was protected, however, by the interdict De precario, an interdict Recuperandae possessionis.

The Superficiarius (holder of a Real right (jus in re) to a house of which an owner of the ground is proprietor, e. g. a person who with permission of the landowner has built out of his own materials a house on another person's land) has, according to Savigny, only juris quasi-possessio: but this is inconsistent with the fact that he is protected by the interdicts Unde vi and De precario, Dig. 43, 16, 1, 5. According to Vangerow he has Derivative possession like the four above mentioned: but this is inconsistent with the fact that he is protected by the special interdict De superficiebus, while the owner of the soil retains the protection of Uti possidetis, Dig. 43, 17, 3, 7, which in Derivative possession is transferred to the Derivative possessor. The true doctrine, then, appears to be that Superficiarius has Original possession of the house, though the landlord has possession of the soil, Baron, § 183.

As possession consists of two elements, one corporeal and one mental, it is evident that it cannot be acquired by a purely mental act. Adipiscimur possessionem corpore et animo, neque per se animo aut per se corpore, Dig. 41, 2, 3, 1. 'We acquire possession

by the conjunction of a corporeal and a mental act, and not by either separately.' Neratius et Proculus solo animo non posse nos adquirere possessionem aiunt, si non antecedat naturalis possessio, Ibid. 3. 'Intention alone does not suffice for acquiring possession unless preceded by detention.' Detention necessarily implies not corporeal contact, but corporeal presence [except when a movable is by my order placed in my house during my absence], and is the physical power of dealing immediately with a subject and excluding any foreign agency. The acquisition of detention is Prehension, which is never fictitious or symbolical, but a real physical change of relation. The continuance of possession requires a continuance of both the elements which are essential to its acquisition, that is, both physical control and the intention of enjoying as proprietor. Fere quibuscunque modis obligamur iisdem in contrarium actis liberamur, quum quibus modis acquirimus, iisdem in contrarium actis amittimus. Ut igitur nulla possessio acquiri nisi animo et corpore potest, ita nulla amittitur nisi in qua utrumque (utrumque =alterutrum, or read utcunque or utrumcunque) in contrarium actum est, Dig. 50, 17, 153. 'As obligation is dissolved by a reversal of the conditions under which it is created, so possession is lost by a reversal of the conditions under which it is acquired. As its acquisition demands the concurrence of a corporeal and a mental condition, so its termination requires the reversal of one or the other.' Ejus quidem quod corpore nostro teneremus [dicam] possessionem amitti vel animo vel etiam corpore, Dig. 41, 2, 44. 'When we detain in person, possession may be terminated by either a mental or a physical change.'

The physical condition, however, is not to be interpreted so strictly in the continuance of possession as in its commencement; for continued possession permits a temporary suspension of physical control, and only requires the power of reproducing this relation at will: for instance, it is not lost if we have left a thing unintentionally in a forest, but remember the exact spot; or have stowed a thing in a place of security, but forget for the moment where we put it; or abandon an Alpine pasture in winter, with the intention of revisiting it on the return of summer. Nerva filius res mobiles, excepto homine, quatenus sub custodia nostra sint, hactenus possideri, id est, quatenus, si velimus, naturalem possessionem nancisci possimus, Dig. 41, 2, 3, 13. 'The possession of movables, excepting slaves, is terminated by loss of custody, or the power of

reproducing at will natural detention.' There was an exception in the case of slaves, for a fugitive slave was regarded as still in his master's possession, and in the case of land, for a man did not lose possession of his land which had been invaded in his absence until he had notice of the invasion; that is to say, he retained possession in the interim solely by his mental disposition. Nam saltus hibernos et aestivos, quorum possessio retinetur animo, licet neque servum neque colonum ibi habeamus, quamvis saltus proposito possidendi fuerit alius ingressus, tamdiu priorem possidere dictum est, quamdiu possessionem ab alio occupatam ignoraret, Dig. 41, 2, 44. 'When a winter or summer pasture, retained in possession without the instrumentality of slaves or tenants, solely by the mental relation, is invaded by a stranger, the prior possessor is not regarded as ousted from possession until he has notice of the invasion.' It is by reference to this laxer interpretation and to these exceptions that we can understand the statement of Gaius, § 153, that possession may be retained without a continuance of corporeal detention.

A guardian acting alone may acquire possession for an infant ward, that is, a child under the age of seven. Or possession may be acquired by Prehension on the part of the infant, while the Animus domini is supplied by tutoris auctoritas, Dig. 41, 2, 32, 2. This is exceptional, because in other matters tutoris auctoritas could only be given to a child infantia major, i.e. after completion of seven years of age. After seven years complete a child can acquire possession for itself either with or without the guardian's authority, 3 § 109; Dig. 26, 8, 9 pr.

The possessor of a whole or a substance formed by the combination of various parts (universitas) does not separately possess with intention of ownership the various elements of which it is composed. If, then, a man begins by possessing the whole and completes the usucapion of the whole before its dissolution into its component parts, the result will depend on the question whether all the parts belonged to the original proprietor of the whole or some of them belonged to a third person. If some of the materials belonged to a third proprietor, then, as these have not been separately possessed during the period of combination, the usucapion of them only begins to run after the dissolution of the whole, Dig. 6, 1, 23, 7; Dig. 41, 1, 7, 11. This rule is not a singularity of timber (Dig. 47, 3), but applies to all materials that have been combined into a whole, whether movable or immovable.

If all the materials belonged to the proprietor of the whole, then he who acquires by usucapion the whole is proprietor of all the materials if they are subsequently separated, just as he would be if he had acquired property in the whole by tradition or any other valid form of alienation from the original proprietor.

If the dissolution of the whole precedes the completion of usucapion, then the usucapion of the separate materials has to begin ab initio, Dig. 41, 3, 23 pr. Thus, if a man has possessed a house for nine years and six months, he will complete its usucapion in another six months: but if any of the materials (windows, doors, columns, tiles) are separated, he will require three years to acquire them by usucapion as movables.

If, on the contrary, a person begins by possessing the materials separately and after a time combines them into a whole, the question whether his usucapion of the materials continues to run depends on the principles which govern the *loss* of possession. Possession is not lost by the absence of animus possidendi, but by a positive animus non possidendi. As this cannot here be alleged to exist, the usucapion of the materials will continue to run in spite of their combination and will be completed as soon as if they had remained separate, Dig. 41, 3, 30, 1. An exception is produced by the prohibition of the Twelve Tables to sue for building materials as long as they form a portion of a house (tigna juncta aedibus, Dig. 47, 3): for, as agere non valenti non currit praescriptio, the usucapion of the timber must be suspended until the house from any cause is demolished. Vangerow, § 204.

Having passed in review the nature of Possession and the form of the Possessory interdicts, we may now examine the often mooted question what is the relation of Possession to the classification of Rights as Real or Personal: to which division of actions, Real or Personal, is procedure by the Possessory interdicts to be assimilated?

The answer to this must begin by distinguishing mere Possession or Interdict-possession, from Possession associated with Titulus and Bona fides, or Usucapion-possession. The latter is incipient property, and is recoverable by actio in rem Publiciana, 2 § 41; that is, is treated in respect of its remedy as if it were perfect property: Usucapion-possession then is a Real right and is recoverable by a Real action.

All interdict procedure belongs to the class of Personal actions enforcing obligations generated by delict. Jure honorario obligamur

ex his quae edicto perpetuo vel magistratu fieri praecipiuntur vel fieri prohibentur, Modestinus, Dig. 44, 7, 52, 6. 'The ordinance of the magistrate is the source of an obligation in matters which the annual edict or the magistrate enjoins or forbids.' Interdicta omnia, licet in rem videantur concepta, vi tamen ipsa personalia sunt, Ulpian, Dig. 43, 1, 3. 'All interdicts, though impersonal (Real) in terms, are in substance Personal actions.'

The party against whom judgment was given in interdict procedure was found guilty of having committed a delict; that is, of having disobeyed the mandate contained in the interdict of the magistrate. Interdict procedure then belonged to the class of penal or delictual actions. That the possessory interdicts in particular (Utrubi, Uti possidetis, and Unde vi) were classed with actions ex delicto, appears from the fact that they were only maintainable against the wrong-doer within a year from their nativity, Dig. 43, 17, 1 pr.; Dig. 43, 16, 1 pr.; and were only maintainable against the heir of the wrong-doer so far as he was enriched by the wrong of his predecessor (quatenus ad eum pervenit .... ut tamen lucrum ei extorqueatur, Dig. 44, 7, 35 pr.), features which the interdicts have in common with other unilaterally penal actions.

The right of a person who has been dispossessed to be reinstated in possession is a secondary right based on the violation of some primary right. What was the nature of that primary right? According to Savigny it was the right of a freeman to be exempt from violence or corporeal molestation; not the right of a possessor to continue in possession. He denies, that is, that the fact of Possession is a title investing the possessor with a Real right to continue in possession; and bases the right of reinstatement on another Real right, one of the rights that we have called Primordial, the right to immunity from corporeal violence.

The classical jurists seem to have evaded the question. The delict adjudicated upon in interdict procedure is in form the violation of a public duty, the duty of obedience to the magistrate. That it was in substance the violation of a private or civil right of a person who has been dispossessed did not appear on the face of the proceedings; and consequently the nature of this right had not to be investigated.

Considering that possession involved a right against the world to freedom from molestation; remembering, further, the old division of Real actions in English law into Possessory and Droitural, and

observing the practical similarity of the Possessory interdicts to the Possessory real actions, an Englishman will be inclined to look upon Utrubi and Uti possidetis as practically Real actions and Possession as practically a Real right. Unde vi implies a genuine tort, and may find its proper place among Personal actions ex maleficio. This arrangement has the authority of Vangerow, who introduces Utrubi and Uti possidetis along with Vindicatio into the law of Dominion, and makes these interdicts bear towards Vindicatio in the department of Ownership the relation which in the department of Succession Quorum bonorum bears to Petitio hereditatis.

That in a given system of positive law what is in substance a Real action may assume the form of an action on Delict, we may convince ourselves by remembering some of the anomalies of the scheme of actions in English law. Trover and Detinue, which were brought to recover movable property, and therefore were in substance Real actions, were kinds of Trespass, that is of action on delict: Assumpsit, the remedy for enforcing a simple contract, was externally a species of Trespass on the Case, another action on delict: and Ejectment, practically the sole real action for the recovery of land, was theoretically another species of Trespass.

The interdict, as originating action, bears some resemblance to a now abolished institution of English law, the Original writ. But the Original writ was a mandate addressed by the head of administration or judicature to the sheriff; that is, to an executive officer, not, as the interdict, to the individual suitor. Besides, this mandate of the crown required the sheriff to command a defendant to obey the crown by obeying the precepts of the legislator: the peculiarity of the interdict, as appears from the preceding account of its character, was that it formed of itself the whole of the law which the suitor was commanded to obey. The possessory interdicts, for instance, simple and meagre as they outwardly seemed, really comprised the whole law (the whole synthesis of Title and Obligation) that governed the subject of Possession. And the same is true of all the other interdicts which have been enumerated. This, as already observed, is apparently the true interpretation of the terms in which Gaius expresses the distinctive feature of Interdicts: certis ex causis Praetor aut Proconsul PRINCIPALITER auctoritatem suam finiendis controversiis interponit, § 139: i.e. in issuing an interdict the magistrate exercised a principalis auctoritas, wielded a sovereign authority.

As particular commands addressed to individuals, instead of universal commands addressed to the community, Interdicts may be regarded as survivals into a later and more organized stage of society of the THEMISTES (judgments anterior to law, the basis of future law) of the primeval ruler. See Maine's Ancient Law, p. 4.

But though originally the subjects of the Interdict had been omitted by the legislator, as matters rather of administration than of legislation; yet after many individual Interdicts had been issued, and their conditions had been generalized by the authorities of jurisprudence; after moreover the rules which would be observed in their issue had been announced by the magistrate in his annual proclamation; the area of questions decided by Interdict was practically as much subject to law as any other department of Roman life. The code of rules promulgated by the magistrate (jus praetorium), being accepted by the state, was just as much law as if it had been enacted by the legislative assemblies: so that finally Interdict procedure differed from ordinary litigation merely by a fringe of form, that served as a memento of its historic origin, the extraordinary power of the magistrate in republican Rome: and Justinian in his Institutes devotes only a single sentence to abolishing this fringe and assimilating procedure in the domain once managed by Interdict to the procedure employed in all the other departments of the code, Inst. 4, 15, 8.

DE POENA TEMERE LITIGANTIUM.

§ 171. *Sed adversus reos quidem infitiantes ex quibusdam causis* dupli *actio constituitur*, velut si iudic*ati* aut depensi *aut* dam*ni iniuriae* aut l*egatorum* per d*amnationem relictorum nomine* agitur: ex quibusdam causis sponsionem facere permittitur, velut de pecunia certa credita et pecunia constituta: sed cert*ae* quidem creditae pecuniae tertiae partis, constitutae vero pecuniae partis dimidiae.

§ 171. The defendant's denial of his obligation is sometimes punished by the duplication of the damages to be recovered. This occurs in an action on a judgment debt, or for money paid by a sponsor, or for injurious damage, or for legacies left in the form of judgment debt. Sometimes a wager of a penal sum is permitted, as in an action of loan, or on a promise to pay a pre-existing debt, in the former case of one third of the sum in dispute, in the latter of one half.

§ 172. Quodsi *neque sponsionis, neque* dupli *actionis* periculum *ei* cum quo agitur *i*niungatur, *aut* ne statim *qui*dem ab initio pluris quam

§ 172. In the absence of a penal wager, and of duplication of damages on denial, and of absolute multiplication of damages, the plaintiff with

simpli sit actio, permittit Praetor iusiurandum exigere non calumniae causa in*f*it*ias ire*: unde qu*ia* heredes vel qui heredum loco *ha*bentur, nu*m*quam p*oen*is obligati sunt, item feminis pupilli*s*que *remitti* s*ole*t *poe*-*na* sponsionis, i*u*bet modo eos i*urare*.

the praetor's leave may exact an oath from the defendant that his denial is conscientious. Accordingly, successors and quasi-successors, who are always exempt from penalty, and women and wards, who are excused the compulsory wager, are required to take the oath of bona fides.

§ 173. Statim aut*em* ab initio pluris quam simpli actio est, velut furti manifesti quadrupli, nec manifesti dupli, concepti et oblati tripli: nam ex his causis et aliis quibusdam, sive quis neg*et* sive fateatur, pluris quam simpli est actio.

§ 173. There is an absolute multiplication of damages in various actions: in an action of manifest theft a quadruplication, for theft not manifest a duplication, for possession or obtrusion of stolen goods a triplication: for in these and some other actions the damages are a multiple of the plaintiff's loss, whether the defendant denies or confesses the claim.

§ 174. Actoris quoque calumnia coercetur modo calumniae iudicio, modo contrario, modo iureiurando, modo restipulatione.

§ 174. On the part of the plaintiff reckless litigation is checked by the action of dishonest litigation, by the Contrary action, by oath, and by restipulation.

§ 175. Et quidem calumniae iudicium adversus omnes actiones locum habet. et est decimae partis *causae*; adversus interdicta aut*em* quartae partis *causae*.

§ 175. The action of dishonest litigation lies against the plaintiff for the tenth part of the value he has claimed by action, and for the fourth part of the value he has claimed by interdict.

§ 176. Liberum est *illi* cum quo agitur aut calumniae iudicium opponere, aut *iusiurandum* exigere non calumniae causa agere.

§ 176. It is optional to the defendant whether he brings an action of dishonest litigation or exacts an oath of bona fides.

§ 177. Contrarium autem iudicium ex certis causis constitui*tur*: velut si iniuriarum agatur, et si cum muliere eo nomine agatur, quod dicetur ventris nomine in possessionem missa dolo malo ad alium possessionem transtulisse; et si quis eo nomine agat, quod dicat se a Praetore in possessionem missum ab alio quo admissum non esse. sed adversus iniuriarum quidem action*em* decimae partis datur; adversus vero duas istas quintae.

§ 177. The Contrary action only lies in certain cases, for instance, against the plaintiff in an action of outrage, in an action against a widow put into possession in the name of her unborn child for fraudulent transfer of possession, or an action for non-admission of a person sent into possession by the praetor. In the action of outrage it lies for the tenth of the damages, in the two latter actions for the fifth.

§ 178. Severior autem coerc*i*tio est per contrarium iudicium: n*am*

§ 178. Of these repressive measures the Contrary action is the

calumniae iudicio x. partis nemo damnatur, nisi qui intellegit non recte se agere, sed vexandi adversarii gratia actionem instituit, potiusque ex iudicis errore vel iniquitate victoriam sperat quam ex causa veritatis; calumnia enim in adfectu est, sicut *f*urti crimen. contrario vero iudicio omni modo damnatur actor, si causam non tenuerit, licet ali*qua* opinione inductus crediderit se recte agere.

more severe. A plaintiff sued for dishonest litigation, to forfeit the tenth of the value, must have known he had no right, and have sued to harass his adversary, in reliance on the error or iniquity of the judex, rather than on the justice of his cause; for dishonest litigation, like the crime of theft, implies intention. In the Contrary action he is condemned if he merely loses the previous action, even though he had grounds for believing in the goodness of his cause.

§ 179. Utique autem ex quibus causis contrario iudicio agere potest, etiam calumniae iudicium locum habet: sed alterutro t*antum* iudicio agere permittitur. qua ratione si iusiurandum de calumnia exactum fuerit, quemadmodum calumniae iudicium non datur, ita et contrarium non dari debet.

§ 179. Wherever the contrary action lies, the action for dishonest litigation also lies, but they are not concurrent; and an oath of bona fides excludes both the action of dishonest litigation and the Contrary action.

§ 180. Restipulationis quoque poena ex certis causis fieri solet: et quemadmodum contrario iudicio omnimodo condemnatur actor, si causam non tenuerit, nec requiritur an scierit non recte se agere, ita etiam restipulationis poena omnimodo damnatur actor.

§ 180. The restipulatio also is confined to certain cases, and the plaintiff who loses his cause, as he is condemned in the contrary action, so he forfeits the penalty of the restipulatio, even though he sued with bona fides.

§ 181. *Sane* si ab ac*to*re *ea restipulationis* poena petatur, ei neque calumniae iudicium opponitur, neque iurisiurandi religio *in*iungitur: nam contrarium iudicium *in* his causis locum non habere palam est.

§ 181. The restipulatio precludes a party from suing for dishonest litigation, from exacting the oath of bona fides, and from instituting the Contrary action.

§ 182. Quibusdam iudiciis damnati ignominiosi fiunt, velut furti, vi bonorum raptorum, iniuriarum; item p*ro* soci*o*, *fiduciae*, *tutelae*, *man*dati, depositi. sed furti aut vi bonorum *raptorum aut iniuriarum non solum* damnati notantur ignominia, sed et*iam pacti: idque ita in edicto Praetoris* scriptum est. et recte: plurimum *enim interest utrum ex delicto* aliquis, an ex contractu debitor *sit*. [4½ *lin.*]

§ 182. In some actions condemnation carries infamy, as in the actions of theft, rapine, outrage, partnership, trust, guardianship, agency, deposit. In prosecutions for theft it is not only infamous to be condemned, but also to compromise, as the edict justly ordains; for obligation based on delict differs widely from an obligation based on contract. Condemnation in these actions, however, is only infamous to the principal, not to the person

condemned as surety or procurator.

§ 183. In summa sciendum est eum qui ali*quem in ius vocare vult et cum eo* agere, et eum qui vocatus est [*desunt* 2½ *lin.*] patrono et liber*to* [½ *lin.*] et in e*um* qui adversus ea egeri*t*, *poena constituta* est.

§ 183. Finally, a child may not summon his parent, and a freedman may not summon his patron, to make appearance as defendant in an action without the permission of the praetor, under a penalty of fifty solidi.

§ 184. Qu*ando* autem in ius vocatus fuerit adversarius, ni eo die fini*tum f*uerit negotium, vadimonium ei faciendum est, id est ut promittat se certo die sisti.

§ 184. Upon an appearance in court, if the proceedings are not terminated on the same day, the defendant must give security for an adjourned appearance on a future day.

§ 185. Fiunt aut*em* vadimonia quibusdam ex causis pura, id est sine satisdatione, quibusdam cum satisdation*e*, quibusdam iureiurando, quibusdam recuperatoribus suppositis, id *est* u*t* qui non *st*e*t*eri*t*, is protinus a recuperatoribus in summa*m* vadimonii condemnetur: eaque singula diligenter Praetoris edicto significantur.

§ 185. The security is sometimes with sureties, sometimes without sureties, sometimes on oath, sometimes contains a reference to recuperators, so that on default of appearance the defendant may be immediately condemned by the recuperators in the penal sum of the security; all which is expressed at length in the edict.

§ 186. Et si quidem iudicati depensive agetur, tanti fi*e*t vadimonium, quanti ea res erit; si vero ex ceteris causis, quanti actor iuraverit non *ca*lumniae causa postulare sibi vadimonium promi*tt*i, nec tamen *pluris quam partis dimidiae, nec* pluribus quam sestertium C milibus fit vadimonium. itaque si centum milium res erit, nec iudicati depensive agetur, non plus quam sestertium quinquaginta mili*um* fit vadimonium.

§ 186. In an action on a judgment debt, or for money paid by a sponsor, the sum of the security is equal to the sum in dispute. In other cases it is the amount which the plaintiff swears that he honestly believes to be necessary to his security, provided that it is not more than half the sum in dispute, nor exceeds a hundred thousand sesterces. If, for instance, the sum in dispute is a hundred thousand sesterces, and the action is not brought to recover a judgment debt or money paid by a sponsor, the penal sum of the security conditioned for reappearance may not exceed fifty thousand sesterces.

§ 187. Q*uas* autem personas sine permissu Praetoris i*m*pune in ius vocare non possumus, easdem nec vadimonio invi*tas* obligare nobis possumus, praeterquam si Praetor aditus permittit.

§ 187. Those persons who cannot be summoned to appear without leave of the court cannot be compelled to give security for the adjourned appearance without similar permission.

§ 171. From the duplication of damages against a defendant who denied his delinquency under the lex Aquilia, 3 § 216, and

against a heres charged with a legacy in the form of condemnation, 4 § 9; and from the terms, dare damnas esto = dare judicatus esto, employed both in the lex Aquilia, p. 384, and in bequest by the form of condemnation, 2 § 201, it may be inferred with much probability that both the author of unlawful damage and the heir charged with a legacy by words of condemnation were subject, in the older period of the law, to the same proceedings as the judgment debtor (judicatus); that is, in early times were suable by Manus injectio, 4 § 25, and in later times were bound to give satisdatio judicatum solvi, 4 § 102.

Double damages, as a penalty of misrepresentation, were also an incident of Nexum. Cum ex 12 Tabulis satis esset ea praestari quae essent lingua nuncupata, quae qui infitiatus esset dupli poenam subiret, a jureconsultis etiam reticentiae poena est constituta, Cic. De Off. 3, 65. 'While the Twelve Tables were satisfied with requiring compensation for faults against which a mancipator had expressly warranted, and with punishing a false warranty by double damages, the jurists imposed a similar penalty on reticence.'

Constitutum was a pact (not a stipulation) promising to pay a pre-existing debt on a certain day. If the pre-existing obligation was a natural obligation of the promisor, the constitutum converted a natural into a civil obligation; if it was the obligation of another person, it operated as a guaranty.

As an extremely easy means of transforming naturalis obligatio into civilis obligatio, that is, of arming a creditor with the sharp remedies of the civil law, the invention of the Consensual contract of Constitutum sufficiently explains, as already suggested, the desuetude of the Literal contract of Expensilatio, a process which the ancient Romans employed for the same purpose.

In Condictio and Constitutum the sponsio was optional (permittitur): in Interdicts it was compulsory, § 141. Bethmann-Hollweg, § 96.

§ 175. A charge of calumny implies guilty knowledge or unlawful intention (dolus), the Contrary action implies unlawful ignorance, that is, recklessness or want of consideration (culpa, temeritas).

§ 176. In three personal actions each party was considered as both plaintiff and defendant and had to take both the oath of the plaintiff and the oath of the defendant. Qui familiae erciscundae et communi dividundo et finium regundorum agunt, et actores sunt

et rei, et ideo jurare debent non calumniae causa litem inten et non calumniae causa infitias ire, Dig. 10, 2; 44, 4. 'In tition of inheritance, dissolution of joint ownership, and tracin boundaries, both parties are equally plaintiff and defendant, therefore must swear to the good faith of both the suit and defence.'

In the time of Justinian the action of calumny, the Cont action, sponsio and restipulation had become obsolete, and their place the losing party was condemned in costs, and oath received development, being always administered to b parties and their advocates. Sed pro his introductum est et pr fatum jusjurandum et ut improbus litigator etiam damnum impensas litis inferre adversario suo cogatur, Inst. 4, 16, 10. 'I stead of the old checks the oath of the parties and their counsel h been introduced, and the condemnation of the unsuccessful litiga in the costs of his adversary.' Patroni autem causarum, qui utriq parti suum praestantes auxilium ingrediuntur, quum lis fuerit co testata, post narrationem propositam et contradictionem objecta . . . . . sacrosanctis evangeliis tactis juramentum praestent, quo omni quidem virtute sua omnique ope, quod verum et justu existimaverint, clientibus suis inferre procurabunt, nihil studii re linquentes quod sibi possibile est; non autem, credita sibi caus cognita quod improba sit vel penitus desperata et ex mendacibu allegationibus composita, ipsi scientes prudentesque mala conscienti liti patrocinabuntur; sed et si certamine procedente aliquid tale sibi cognitum fuerit, a causa recedent, ab hujusmodi communione sese penitus separantes, Cod. 3, 1, 14. 'The counsel at the commencement of the hearing, after the exposition of the bill and answer, shall touch the holy Gospels and swear to do their utmost for their clients as far as they believe their cause to be just, but not knowingly to support the wrong, and if in the course of the proceedings they should change their opinion, to retire from the cause.'

§ 184. Vadimonium, cautio judicio sisti, must be distinguished from the security judicatum solvi. It only referred to appearances in jure, and was required whenever there was an adjournment, whereas security judicatum solvi was only required from the defendant in real actions and in certain exceptional personal actions, § 102.

In procedure by cognitio extraordinaria, the in jus vocatio,

summons of the defendant by the plaintiff, was superseded by the evocatio, summons of the defendant by the magistrate through his lictor. Obedience to this summons was compelled by a fine of which we have the formula in Gellius: M. Terentius quando citatus neque respondit neque excusatus est, ego ei unum ovem multam dico, 11, 1. 'As M. Terentius on citation has neither answered nor been excused, I fine him in a single sheep.' If the defendant continued contumacious he was summoned to appear by three proclamations (edicta) at intervals of ten days, and finally an edictum peremptorium was issued in which the magistrate threatened to hear and decide the case in his absence, in default of his appearance, which was done, if he continued disobedient, Dig. 5, 1, 68.

Procedure before a judex was properly called actio, before the praetor, persecutio. Persecutionis verbo extraordinarias persecutiones puto contineri, utputa fideicommissorum, et si quae aliae sunt quae non habent juris ordinarii executionem, Dig. 50, 16, 178, 2. 'Persecutio is the proper name for proceedings before the praetor, as in trusts and other claims which are not triable by an ordinary judex.'

The Libellary procedure which existed in the time of Justinian, having superseded the Formulary procedure, was essentially the same as cognitio extraordinaria. Instead of the summons before the praetor (in jus vocatio) and notice of the action which the plaintiff meant to bring (editio actionis) with which the Formulary procedure commenced, Libellary procedure began with libellus conventionis and commonitio. The libellus conventionis was a writing addressed to the court, signed by the plaintiff, stating his cause of action, and binding himself to prosecute the suit to judgment: it was a form of suing out a writ or summons. Thereupon followed an interlocutio of the court, that is, a commonitio, corresponding to the original writ, addressed to the defendant and served on him, not by the plaintiff but by an officer of the court (executor) along with the libellus. The defendant then either gave cautio judicio sisti, security for his appearance in jure for the definitive appointment of the trial (judicio ordinando), or was liable to incarceration.

Gaius has given us no information concerning Appeal. Under the republic we hear of no right of Appeal in civil suits: it appears however with the empire, and indeed with the first emperor. The

following series of Appeals in civil suits was instituted by Augustus: From the Judex to the Praetor who appointed him: from the Praetor to the Praefectus urbi: from the Praefectus urbi to Caesar. In the provinces a Vir consularis, appointed for the purpose, took the place of Praefectus urbi, Suetonius, Augustus, 33.

For the constitution of the courts in the periods of Legis actio, Formula, Libellus, the student should consult Bethmann-Hollweg's Roemischer Civilprozess.

ADDENDUM.

FORMAL, ABSTRACT, AND SIMULATIVE DISPOSITIONS.

THE following observations are supplementary to the statements, pp. 360 and 413, on the nature of FORMAL contracts.

The contracts which in this treatise have been designated as FORMAL are sometimes from a different point of view called ABSTRACT, and an examination of the meaning of this term may throw light on the function for which Formal contracts were invented by jurisprudence and which this term expresses. The explanation of the term turns on two conceptions: the Cause of an obligation (causa obligationis) and the Form of a disposition: the cause alone needs elucidation.

A unilateral contract, consisting merely of a promise by one party and an acceptance by another, is the result of a decomposition of an actual transaction of commerce and life: actual transactions are always (to set aside for the present the case of Donation) bilateral. The unilateral convention conferring a benefit on A and imposing a burden on B is always accompanied by another unilateral disposition burdensome to A and beneficial to B. The two unilateral dispositions are reciprocally cause and effect: when one is regarded as the causal factor, the other must be regarded (if we may coin a term) as the sequent or dependent factor of the composite or bilateral transaction.

Thus Mutuum, if we take one factor, is the promise to pay a sum *which the promisor has received from the promisee:* if we take the other factor, it is the alienation of property to a person *who promises to reconvey its equivalent to the alienor.* Depositum and Commodatum, if we take one factor, are promises to restore Detention *which has been received from the promisee:* if we take the other factor, they are a delivery by a depositor or lender of Detention *which the depositary or borrower promises to redeliver.* In Pignus there is a similar delivery and promise to redeliver Possession. Societas is a promise by a partner to contribute *towards the attainment of a common end towards which the other partner promises a like contribu-*

tion. In Mandate, there is, on the one side, a promise to perform something *at the charge and expense of a principal:* on the other, a grant of authority to deal with the property of the grantor *to a person who promises obedience to the instructions and devotion to the interests of his principal.* Here the italicized words show the causal factors which the various unilateral dispositions require for their support: and similarly all other unilateral pacts might be shown to be dependent factors of compound bilateral transactions.

Each correlated unilateral disposition is both cause and effect. Each is a lever by which the will of one of the contractors is moved. Each is the efficient or motor cause of the other: and (as wills are only moved by motives or ends) each is the final cause of the other.

Although they are thus reciprocally dependent, yet generally in practice one habitually precedes, and thus appears to be the causal factor; while the one which habitually follows appears to be the sequent or dependent factor. This is always the case in Real contracts, where one disposition has always passed beyond the limits of mere convention into an alienation of property (mutuum, nameless contracts: do ut des, do ut facias): alienation of possession (pignus): alienation of detention (depositum, commodatum): or performance of service (nameless contracts: facio ut des, facio ut facias).

The Form of a disposition is what we have elsewhere (p. 10), called its Declaration. All dispositions have two elements or aspects, one external or corporal, the other internal or mental. Internally they are the Intention of a disposer or disposers; externally they are the expression or manifestation of this intention.

FORMAL contract separates the sequent from the causal factor of a bilateral convention, clothes the intention in a strongly marked, sometimes strangely charactered, external expression, manifestation, or FORM, in exact conformity to the prescription of archaic law or primeval custom, and thus constitutes a unilateral convention valid by form. FORMLESS contract is bound by no requirement of Form and has no validity in isolation from its cause. FORMAL conventions from the separation or abstraction of the sequent from the causal factor, are appropriately called ABSTRACT; while for the opposite reason FORMLESS conventions may be denominated CONCRETE.

Abstract conventions sometimes contained in their formalities a shadowy recognition of their departure from the concrete realities of life—a confession of the necessity of a supporting Cause in actual commerce; but sometimes contained no such avowal. Thus Nexum

and Expensilatio contained the phantom of a money loan, the analogon of the 'Value received' clause in a modern bill of exchange. But this recognition was not universal; for Stipulatio, whatever may have been its original form, (—if derived from Stips, the word suggests prepayment by the promisee: if connected with Stipes, it merely signifies a binding formula—) in the shape with which we are acquainted does not hint as a motive or cause of the advantage conferred on the promisee any compensating burden that he has previously borne.

The function of ABSTRACT conventions, the purpose for which they were invented, is obviously the facilitation of the Proof of rights and duties by means of the simplification of their Title. The more comprehensive the conditions of the Title to which a right is annexed, the more complicated and troublesome will be its Proof. The causal factor of Formless contracts yields to a fraudulent debtor at least as many positions where he can intrench himself as the sequent factor. The necessity imposed on the plaintiff in an action on a Formless contract of proving the existence of an adequate cause doubles his burden of proof: Abstract conventions reduce this burden to a fraction.

From the statement, p. 377, that a certain evidence of the contract is an integral part of Formal but not of Formless contracts, that Formal conventions, in other words, take up into their essence a certain preappointed evidence, while Formless contracts are complete independently of this, it might be inferred that the elements of the Formal contracts were more complex than those of the Formless: but this would be an erroneous conclusion. The admission of evidentiary matter into the essence of the Formal or Abstract convention is more than counterbalanced by the exclusion of the causal factor. The evidentiary matter is something visible and audible and easy of proof and adjudication; prescribed, indeed, for the very reason that it is so easy of proof and adjudication: whereas the causal factor, involving a question of intention as well as of fact, may furnish scope for endless subterfuge and controversy.

If the promisor has a just defence, this does not destroy the validity of the Formal contract: does not prevent it from in the first instance imposing an obligation: it only gives the debtor the right to have such obligation reversed by means of a condictio sine causa. This condictio, however, is only a personal remedy against the promisee: if by means of Delegation the debt has been

transferred to a new creditor, it cannot in his hands be impeached for any want of causa: the remedy of the debtor (expromissor), if he has become aware of a want of consideration for his promise, is not against the transferree but against the original creditor (delegator). Sed si per ignorantiam promiserit creditori, nulla quidem exceptione adversus creditorem uti poterit, quia ille suum recepit, sed is qui delegavit tenetur condictione, Dig. 46, 2, 12. Doli exceptio, quae poterat deleganti opponi, cessat in persona creditoris cui quis delegatus est, Dig. 46, 2, 19; Dig. 23, 3, 78, 5. This stability of the effects of Formal contract was obviously of the utmost importance to the development of infant commerce.

The validity of Formal contracts irrespective of the causal factor was to a certain extent infringed in later jurisprudence by the admission of the Exceptio non numeratae pecuniae. For the space of two years after a stipulatio the creditor who sought to enforce the contract was under the necessity of proving the existence of the causa (numeratio pecuniae): to this extent, then, Stipulatio was reduced to the disadvantageous position of a Formless contract.

FORMAL dispositions were not confined to the sphere of contract: in the sphere of alienations Traditio is Formless while Mancipatio and In jure cessio are Formal. Formal alienations present the same contrast that we noticed between Formal conventions. Mancipatio by its simulation of a purchase and the payment of purchase money makes the same shadowy recognition of a causal factor that Nexum and Expensilatio made by the fiction of a loan: while in Jure cessio (if we can speak with confidence of a process about which we know so little) resembled Stipulatio in containing no such recognition.

Ihering who has handled this topic, § 55, applies the term ABSTRACT to Formal alienations. When, however, we compare Formal and Formless alienations we find the terms Abstract and Concrete not so applicable to alienations as they were to conventions, and for this reason: in Formless alienation there is as complète an ABSTRACTION or severance of the sequent from the causal factor as there is in Formal; and Tradition is as unilateral a transaction as Mancipation or Judicial Surrender.

This assertion may seem inconsistent with the doctrine (p. 201) that, to constitute a valid alienation, Tradition must be preceded by some justa causa, Donatio, Contractio, or Solutio. This preceding disposition, however, is not required in order to form the causal factor of a bilateral disposition, but in order to furnish evidence of

the Intention required for a unilateral disposition: to prove the existence of animus transferendi dominii, without which Tradition would be a Form without a substance, would want the internal element it requires in order to amount to a Disposition. Once let the sequent factor, the intention requisite for a unilateral disposition, be proved, and the justa causa, the donandi, credendi, solvendi animus is immaterial. Thus a misunderstanding between alienor and alienee respecting the nature of the transaction, the one intending a loan the other a donation, or the one intending the discharge of a debt imposed by testament the other the discharge of a debt imposed by stipulation, is immaterial: because the intention of donation and of loan, of paying a legacy and of paying a stipulated debt, alike involve the animus transferendi dominii. Quum in causis dissentiamus, non animadverto cur inefficax sit traditio: veluti si ego credam me ex testamento tibi obligatum esse ut fundum tradam; tu existimes ex stipulatu tibi eum deberi. Nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire, nec impedimento esse quod circa causam dandi atque accipiendi dissensimus, Julian, Dig. 41, 1, 36. An error in respect of the causa may be sufficient to entitle an alienor to condictio indebiti or condictio sine causa; i.e. to a suit for reconveyance for want of consideration: but it does not prevent the transmutation of ownership in the first instance: and if the property passes onward to a third person the alienor cannot reach it in his hands, but has only a personal action against the original alienee.

In one particular instance, by special statutory enactment, the causa traditionis is material to the efficacy of Tradition. Tradition solvendi animo, when the solutio intended is the performance of a contract of sale, operates no transmutation of property except in sales expressly on credit until the purchase money is paid or security is given for its payment. This, as we have seen, p. 204, was a provision of the Twelve Tables. Mancipation and Judicial surrender were not thus restricted in their operation, but transferred ownership irrespectively of the payment of purchase money. In Mancipation the requirement of the Twelve Tables was deemed to be satisfied by the simulation of payment (isque mihi emptus est hoc aere aeneaque libra); and possibly, as Ihering suggests, the requirement of the Twelve Tables was the very reason why the simulation of payment was introduced into this solemnity.

In this single point, then, Mancipation and Judicial Surrender were more completely isolated from their causa than Tradition: but with this exception Formal and Formless alienations were equally ABSTRACT. Both operated transfer of dominion in spite of any flaw in the causa. If such a flaw existed in either a Formal or a Formless alienation, it only gave the alienor a personal action (condictio) against the alienee for reconveyance. He could not recover the property if it had passed out of the hands of the first alienee into those of a second.

If we inquire why Formless alienation was allowed to have validity irrespectively of the causal factor, we shall find the reason to be, that Tradition or parting with possession, though a Formless proceeding, is an act of so serious a character as effectually to preclude all idea of indecision—to prove that the parties had reached the stage of definitive resolution. Accordingly the intention of transferring ownership when manifested by Tradition seems to deserve all the efficacy that could be imparted by the observance of the most solemn Forms.

As in the later jurisprudence Stipulatio was robbed of part of its efficacy by the Exceptio pecuniae non numeratae, so in the later period of Roman law Alienations whether Formal or Formless were deprived of part of the trenchancy of their operation by the actio quod metus causa and Restitutio minorum, impersonal remedies (in rem) which reached the property to whatever hands it might have arrived by the effect of subsequent alienations.

If, then, Formal alienations were not simplifications of title in virtue of any greater ABSTRACTNESS than was possessed by Formless alienation, for what other advantage were they introduced into commerce? by what other attribute were they a facilitation of Proof? They facilitated proof (1) of the specific intention of a disposer against an allegation of a different intention, and (2) of the existence of intention against the denial of all intention.

(1) Tradition might be made with the design of merely transferring Detention. Such was its effect in Depositum, Commodatum, Mandatum, Locatio. Or, secondly, it might be made with the purpose of transferring something more than Detention, namely Possession. Such was its effect in Pignus and Precarium. Or, thirdly, it might be made with the intent of transferring Property, as in Donatio, Mutuum, Solutio. Which of these intentions prompted a given Traditio might be extremely difficult to prove.

The difficulty vanishes in Mancipation and Judicial Surrender. Their forms comprehend a most emphatic and trenchant expression of intention. 'I am invested with dominion' (hunc ego hominem meum esse aio) is the exclamation of the alienee, confirmed by the assent of the alienor, in both modes of Formal alienation.

(2) Formless dispositions whether alienations or conventions may leave a doubt not only which of several intentions governed a procedure but whether any intention at all had been matured in the minds of the negotiators. Had the parties passed the stage of mere contemplation, inclination, preliminary discussion, were they still vacillating, now yielding to an attractive prospect, now receding from half-made concessions? Or had cupidity and timidity, desire and hesitation, given place to final decision and deliberate resolve? It is obvious that the formalities of the solemn modes of contract were invented for the purpose of excluding all doubt from the answers to these questions.

Beginning these remarks we adjourned the consideration of Donation, which may now be noticed. Unilateral dispositions, we have seen, do not exist in the actual world unaccompanied. Each implies another on which it leans. Intention to incur a loss has its final and efficient cause in intention to procure a gain. If this was universally true we might say that all dispositions were bilateral: i.e. that in all a pecuniary loss incurred at one stage of the transaction is balanced by a pecuniary gain accomplished at another. This holds of all mercantile transactions which are the bulk of those that occupy the attention of jurisprudence. The market, however, is not the whole of the world, nor are mercenary acts the whole of life; and there is such a thing as a disinterested disposition, a disposition wherein a man incurs a loss to which the causa or motor factor is the intention not of counterbalancing gain in another part of the transaction, but of pure and simple and unrequited liberality.

Donation may be found in the sphere either of Dominion or of Obligation; it may be accomplished either by alienation or by promise: the intention of liberality may be consummated either by Tradition or by Stipulation. Donation, that is to say, is one of the causae obligationis as well as a justa causa traditionis: and it was in contemplation of a contract animated by such a cause that we abstained when beginning this note from saying unreservedly that all actual conventions were bilateral.

I will seize the present opportunity of supplying an omission in

the commentary and noticing another feature common to many Formal dispositions.

The FORMAL dispositions of Roman jurisprudence were frequently SIMULATIVE. When a new juristic purpose was to be accomplished, the method of jurisprudence was, instead of creating for it by an effort of imagination a new corporeal form, to lay hold of some existing disposition, and wrenching it more or less completely from its original basis and original uses, to employ its more or less twisted and distorted form as a vehicle or incorporation of the new intention. The new intention is the reality: the original intention is divorced from the form once its own, and now is merely SIMULATED. Thus Judicial surrender (in jure cessio) is intended to effect a transmutation of ownership from person to person: in form it is a judgment respecting an already existent ownership. Nexum and Expensilatio were intended to operate novations, to transform equitable into legal obligation: in form they both were loans of money. Mancipation a solemn form of conveying dominion simulated a sale and the accompaniment of primeval sales, the weighing of the uncoined masses of bronze that served as purchase money. The form then, instead of being the natural execution and expression of an intention, has but a remote correspondence to the end which it embodies, and sometimes may be called SYMBOLIC: e.g. the production of the scales and bars of bronze and pantomime of weighing in Mancipation was the natural mode of executing an archaic sale, but is merely a SYMBOLIC or hieroglyphic expression of the transmutation of dominion. Sometimes a mimetic disposition became itself the object of subsequent mimicry. Thus while Mancipation was a fictitious sale (imaginaria venditio, 1 § 113), Testament was a fictitious Mancipation (imaginaria mancipatio, Ulpian 20, 2), i.e. the simulation of a simulation.

The Simulative character was not a universal feature even of the older Formal dispositions: for instance, Stipulation seems to have had nothing mimetic in its form: while later jurisprudence, when it had to invent a form, never adopted the symbolic style. Rigorous forms were prescribed as a condition of the validity of various dispositions: e.g. the presence of a certain number of witnesses for the execution of a Will: declaration before a notary for a guaranty by a woman: memorandum in the official records of a magistrate (actis, gestis insinuare) for donations of more than 500 solidi: none of which were simulations of any more primitive procedure.

The degree of integrity or mutilation in which the primeval disposition persisted in the modern institution varied in different instances. Sometimes the old proceeding imposed all its rules on the new institution: more commonly many of its aspects were effaced and only isolated incidents continued in force. The procedure which involved Coemptio, 1 § 113, was applied by the ingenuity of later jurists to accomplish three purposes never dreamed of by those who presided over its introduction: the extinction of the sacred rites by which the estate of an heiress was burdened; the change of guardian by a woman at the period when all women were under wardship; and the acquisition of testamentary capacity by a woman at a time when widowhood was the only title by which it could be acquired. It was a complicated process and consisted of three factors, each of which was an archaic institution: (1) a Hand-marriage (in manum conventio) accompanied with a fiducia for remancipation; (2) a remancipation accompanied with a fiducia for manumission; (3) a manumission and consequent wardship. Of these factors the Hand-marriage was a pure unreality: it was divested of reality by the accompanying fiducia; yet one of its incidents continued in force, the transfer of the obligation to the sacred rites from the heiress to the coemptionator. The second act was so far an unreality that it was no longer the sale of a wife by her savage lord in exchange for some more coveted commodity: but it was real so far as it subjected the remancipated woman to capitis minutio. The manumission was unreal so far as it implied a vindication into freedom or a liberalis causa and an escape from the hardships of bondage: but it was real so far as it had the effect of making the manumitted ex-bondwoman the ward of her manumitter.

Emancipation was another ceremony which employed a primitive disposition divested of its natural motive. The independence of the son whose father had three times sold or leased his patria potestas over him to a stranger was originally enacted by the Twelve Tables as a punishment for an odious and unnatural exercise of parental rights. In later times the mancipation of the son for the sake of its legal consequences was an act of self-abnegation on the part of the father; a means of promoting the son to an independent position, the status of head of a household.

The positive and arbitrary character of SIMULATIVE dispositions displays itself in the fact that the laws of the original dispositions

which they welded into their substance were neither consistently regarded nor consistently disregarded. (A) Sometimes they were regarded in spite of the inconvenience they occasioned: (B) sometimes convenience prevailed: the new institute acquired an independent position; and logic and archaeology were set at defiance.

(A) The form of Judicial surrender could not be employed for the acquisition of property by the agency of an inferior (son or slave) because such a person could not be a plaintiff in a genuine vindicatio. Hence the inferior could be an instrument for acquiring a rustic servitude, because he could be a party to a mancipation, but not for acquiring an urban servitude, because this could only be conveyed by Judicial surrender, 2 § 29.

In Mancipatio the payment by bars of bronze was as fictitious as the apprehensio or taking possession; and yet it sufficed to satisfy the requirement of the Twelve Tables whereby in Sale and delivery the passing of property was suspended until payment of the purchase money.

Women were incapable of Adrogation because this solemnity involved a fictitious assembly of the Comitia Curiata; and in such an assembly women were not allowed to be present.

In the mancipatory will the Familiae emptor was originally the appointed successor; and therefore, to exclude interested testimony (domesticum testimonium) persons united to Familiae emptor by the bond of patria potestas were disqualified for the rôle of witness. The disqualification was continued, in spite of the inconvenience it would occasion, when the familiae emptor was a mere fiction; and, what is more extraordinary, legatees and persons united to the true successor were admissible as witnesses although the policy of the legislator was thereby entirely defeated (totum jus tale conturbatum fuerat, Inst. 2, 10, 10).

(B) In the following instances on the contrary the laws of the simulated institution were disregarded. Hereditatis petitio being a form of Vindicatio we might have expected that any kind of inheritance when once vested would be transferable by Judicial surrender or fictitious vindication, just as any form of inheritance could be litigated by genuine hereditatis petitio. But we find that only the intestate succession of a collateral (legitima hereditas) could be thus conveyed, and this only before it had vested by aditio in the alienor, 3 § 85.

In Mancipatio, although the fictitious payment sufficed for the

transfer of dominion, yet it did not suffice for the purpose of making the alienor subject to auctoritas, liability to repay twice the purchase money in the event of eviction, Paulus, 2, 17, 1.

Again, the Census, like a year of jubilee, appears to have liberated from genuine bondage; but not to have broken the fictitious bondage of a son who was in the course of emancipation, 1 § 140.

Coemption transferred to the husband the universal estate of the wife, 2 § 98. We may infer e contrario that it had not a similar effect on the property of a woman who merely made a coemption for the purpose of changing her guardian or acquiring testamentary capacity.

The genuine sale of a wife was forbidden at an early period under the severest sanctions: this did not prevent the simulated sale (remancipatio) of a woman by her coemptionator: i.e. the simulating disposition when once established was free from the supervening rules of the simulated disposition.

A Testament affected to be a Mancipation: but juris universitas, the subject of testament, is not found in the catalogue of mancipable things (res mancipi): a testament was revocable, a mancipation irrevocable: a mancipation could not have its operation suspended or made contingent on a condition (p. 384), a testament was a disposition de futuro and might be conditional: a mancipation only conveyed dominion; nexum, which imposed obligation, though cognate, was a distinct institution: testament both invested the successor with dominion and subjected him to obligations: mancipation only affected the alienor and alienee, testament conferred rights on legatees, i.e. strangers who had in no way co-operated in the execution of the testament. The sacrifice of reality to fiction by the slavish adherence to the rules of domesticum testimonium makes it the more remarkable that the testament should have burst asunder so many other restrictions of mancipation. Ihering, Geist des Roemischen Rechts, § 58.

CORRIGENDA.

1.

Titulus usucapionis, Dig. 41, 9, 1, was any disposition capable of conferring ownership which failed in some instance to confer ownership in consequence of the absence of some particular condition. It does not appear that the term Titulus was ever applied to the justa causa Traditionis (solutio, contractio, donatio) by the classical jurists as stated, pp. 173, 202: although we find a Titulus usucapionis called Causa possidendi, Dig. 41, 3, 29.

2.

It is stated, p. 399, that Expromissio is only another aspect of Delegatio; and, p. 430, that Delegatio always involves two Novations, a novation of the debt of Delegans to the Delegatee, and a novation of the debt of Delegatus to Delegans. These statements are based on too narrow a view of the relations that may subsist between the three parties to a Delegatio (Delegans or the Delegator, Delegatus, and Creditor or the Delegatee).

(1) The Delegans may have towards the Delegatee solvendi animus, credendi animus, or donandi animus.

(2) Delegatus may have towards Delegans solvendi animus, credendi animus, or donandi animus.

(1) *a.* When the Delegator is indebted to the Delegatee and has solvendi animus, Delegatus is expromissor of Delegans, and the debt of Delegans is novated. Solvit et qui reum delegat, Dig. 16, 1, 8, 3.

b. But Delegator may have contrahendi animus: and then there is no debt of Delegator to be novated, and Delegatus is not Expromissor. Si me . . . mutuam pecuniam rogaveris, et ego meum debitorem tibi promittere jusserim . . . Dig. 12, 32.

c. Or Delegator may have donandi animus: then again there is no debt of Delegator to be novated, and Delegatus is not Expromissor. Si debitorem meum tibi donationis causa promittere jussi . . . Dig. 29, 5, 21, 1.

In the text of the Digest: delegare est vice sua alium reum dare creditori vel cui jusserit, Dig. 46, 2, 11, pr., the translation, p. 430, assumes that cui jusserit means cui jusserit creditor reum dari: but from the foregoing it appears to mean cui jusserit delegans promitti: so that the whole passage should be translated: 'Delegation is to give another person instead of one's self as debtor either to a creditor or to a non-creditor.'

(2) *a.* In the same way Delegatus may either be indebted to Delegator and have solvendi animus, as is assumed in some of the texts above quoted:

b. or he may have credendi animus, Cod. 8, 42, 5:

c. or he may have donandi animus: Ut mihi donares, creditori meo, delegante me, promisisti, Dig. 39, 5, 21.

If both Delegans was indebted to the Delegatee and Delegatus to Delegans, there are two novations: if only one was indebted there is one novation, if neither was indebted, the Delegation involves no novation.

In Assignatio Assignans orders Assignatus not, as in Delegatio, to promise but, to pay a sum to the Assignatee. The relations between the parties to an Assignatio are as various as those we have indicated between the parties to a Delegatio. Until payment, Assignans has a power of revoking the order, and Assignatus may disobey the order: hence the maxim: Assignation is not payment. But when payment is once made it produces novation and other effects similar to those that are produced by Delegatio. Baron, Pandekten, § 307.

Possibly Dig. 46, 2, 11, pr., in accordance with the original version, contemplates a double delegation: i. e. a proceeding in which the ultimate promisee is not the person whom we have called Delegatarius or Delegatee but a fourth person, Delegatarius of Delegatarius primus, to whom Delegatarius primus may have the intention solvendi or credendi or donandi.

If Delegatarius primus is indebted to this fourth person, this debt will be novated: so that if Delegatus was indebted to Delegator and Delegator to Delegatarius primus, there are three novations.

Similarly Assignatio may be double: the ultimate payee may be a fourth person, Assignatarius of Assignatarius primus, a creditor, borrower, or donee of the first Assignatarius; if he is not, as in the

following example, a mere hand or instrument (son, slave, or agent) by whom the first Assignatarius receives payment.

We know that Cicero pater supplied Cicero filius when a student at Athens with money by the mediation of his friend Atticus who, as publican, had debtors in Greece. The procedure would be as follows:

Atticus (A, assignator) at the request of Cicero pater (C, assignatarius primus), orders Graeculus (B, assignatus) to pay to Cicero filius (D, assignatarius secundus) what Atticus owes to Cicero pater. The payment by Graeculus to Assignatarius secundus, D, discharges the debt of Graeculus to Atticus, the debt of Atticus to Cicero pater, and if D were an independent person, creditor of Cicero pater, the debt of Cicero pater to D.

3.

The translation of 3 § 174 supposes a recital by Gaius of the formula employed in the discharge of the ancient contract of Nexum as well as that employed in the discharge of a judgment debtor from his obligation under a judgment. But Nexum had been so long obsolete that Gaius can hardly have thought it necessary to mention its formula; and doubtless the present paragraph treated solely of the release of judicatus. The words: Si quid eo nomine debeatur quod per aes et libram gestum est, § 173, which suggest a notice of Nexum, refer not to Nexum proper but to legatum per damnationem, an obligation imposed by a mancipatory or Nexum-like will: and the formula for releasing this is given, § 175.

What then, assuming (what is doubtful) that we have the true reading of the text, is the meaning of the last words of the formula for releasing a judgment debt: lege jure obligatur? In the lex Julia municipalis (Tabula Heracleensis) the words: si is jure lege damnatus esset, are explained by Savigny as equivalent to: si is judicio legitimo (3 § 180) damnatus esset, Vermischte Schriften 34, p. 387. But in the well known fragment of the Twelve Tables: rebusque jure judicatis, jure is equivalent to legis actione. The words: lege jure obligatur, then, at the close of the formula may be supposed to denote a debt created either by statute-process (legis actio) or by statutory suit (judicium legitimum): and we may imagine that no obligation of a less primitive character would require to be released by the formality of nexi liberatio.

APPENDIX.

The following list of passages shows the extent to which I have deviated from the text of Gaius as published by Gneist.

1 § 123. 'Si tamen quaerat ali*quis,* quare a coemptio*ne differat mancipatio,*' is the reading of Rossbach for 'Si tamen quaerat ali*quis,* quare citra coemptio*nem feminae etiam mancipentur.*'

1 § 134. 'aut *non* remancipatur patri *sed ei qui adoptat in jure ceditur ab eo apud quem in tertia* mancipatione est,' is substantially the conjecture of Scheurl for 'aut jure mancipatur patri *adoptivo vindicanti filium ab eo apud quem is tertia* mancipatione est,' and later in the same paragraph 'aut *non* remancipantur' is for 'aut jure mancipantur.'

1 § 136. '*Eae vero mulieres quae in manum conveniunt per coemptionem,*' is the reading of Huschke for '*Sed mulieres quae coemptionem fecerunt per mancipationem.*'

2 § 155. 'Velut si *ex eo quod* Latinus adquisierit, locupletior factus sit,' is the conjecture of Savigny for 'Velut si Latinus adquisierit, locupletior factus sit.'

2 § 235. 'sed et [*si quis*] si heres verbi gratia intra biennium monumentum sibi non fecerit, x Titio dari jusserit, poenae nomine legatum est,' is the conjecture of Goeschen for 'sed et si heres,' &c.

3 § 79. 'si vero mortui *per* dies xv. postea jubet convenire creditores,' is the reading of Huschke for 'si vero mortui, post dies xv postea jubet convenire creditores.' And later in the same paragraph 'itaque si vivi bona veneant, in diebus *x legem bonorum vendendorum fieri* jubet, si mortui, in *diebus v. a quibus tandem* vivi bona *die* xx, mortui vero *die* x emptori addici jubet,' is the reading of Huschke for 'itaque si vivi bona veneant in diebus *pluribus veniri* jubet, si mortui, in *diebus paucioribus; nam* vivi bona xxx, mortui vero xx emptori addici jubet.'

4 § 48. '[*sed*],' which several critics propose to insert before 'aestimata,' is omitted by Gneist.

4 § 166. '*et uter eorum vicerit* fructus licitando, is tantisper in possessione constituitur, si modo adversario suo fructuaria stipu*latione caver*it, cuius vis et potestas haec est, ut si contra eum *de pos*sess*ione* pronun*tiatum* fuerit, eam summam adversario solvat' is the restoration of Krueger. Gneist reads: '*Postquam igitur Praetor interdictum reddidit, primum litigatorum alterutrius* res ab eo fructum licitando *rei* tantis*per in possessione constituitur, si modo* adversario suo fructuaria stipu*latione satisdet cuius* potestas haec *est, ut si contra ipsum esset postea* pronun*tiatum, fructus duplam praestet*.'

4 § 170. See p. 640.

INDEX TO COMMENTARY.

A.

B.